

PROCEEDINGS

of a

MILITARY COURT FOR THE
TRIAL OF WAR CRIMINALS

held at

LUNEBURG, GERMANY

on

WEDNESDAY, 7 NOVEMBER, 1945,

upon the trial of

JOSEF KRUMER

and

44 Others.

FORTY-FIFTH DAY.

Transcript of the Official
Shorthand Notes.

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(At 0930 hours the Court reassembles pursuant to adjournment, the same President, Members, and Judge Advocate being present)

The accused are again brought before the Court.

THE PRESIDENT: I think you made an application to call a witness, Major Munro.

MAJOR MUNRO: Yes, sir, but since I made that application I have seen the witness and as he is unable to identify the accused he is of no real assistance. Therefore I do not now propose to call him.

THE PRESIDENT: The next case for the court's consideration was the application of Major Cranfield. The court said they would be prepared to hear a witness, whose name I have not got except I understand her Christian name is Erika, who was able to say that she had known the accused Gross at Auschwitz.

MAJOR CRANFIELD: I have now had a message that she is unwilling to come.

THE PRESIDENT: The next witness the court gave permission to be called was Abraham Levy.

CAPT. ROBERTS: Yes; there again I understand the witness in question has left Belsen and cannot be traced, but I have this affidavit of Brigadier Glyn Hughes which I should like to put in.

THE PRESIDENT: I think it would be better if it were handed in now.

(Affidavit of Brigadier H.L. Glyn Hughes is marked exhibit 148 signed by the President and attached to the proceedings)

CAPT. ROBERTS: It does relate to the defence of No.16. "Deposition of Brigadier Hugh Llewellyn Glyn Hughes C.B.E., D.S.O., Vice Director of Medical Services British Army of the Rhine, sworn before Captain David Fleming Roberts, Royal Artillery, Solicitor. Further to my evidence which I gave before the Military Court for the Trial of War Criminals at Lunenberg on the 18th and 19th September, 1945, I now say:-

1. On the 15th April 1945 I arrived at Belsen Concentration Camp about 1800 hours. I cannot remember the exact time.

2. The disturbance to which I referred in my evidence took place about half an hour after my arrival. The cookhouse concerned was No.2 in the men's camp.

3. To the best of my knowledge the disturbance to which I referred in my evidence was the only such disturbance that took place while I was in the camp on 15th April. If any other large-scale shooting had taken place I should have known about it.

4. I inspected the camp on the morning of April the 16th and I did not notice any large numbers of corpses lying around in the vicinity of cookhouse No.3 in the women's camp. Sworn by the said Deponent Hugh Llewellyn Glyn Hughes at Hamburg this twenty second day of October 1945. H.L. Glyn Hughes. Before me D.F. Roberts, Captain, Royal Artillery, Solicitor".

THE PRESIDENT: Have the accused seen that?

CAPT. ROBERTS: Yes, I had it translated into German and all the accused have had a copy.

THE PRESIDENT: The next matter, I think, affected Major Brown. The court said they would be prepared to accept a letter.

MAJOR BROWN: Yes, I have the letter. (Same handed)

(Letter from Johanna Thorose Kurd is marked exhibit 149 signed by the President and attached to the proceedings)

MAJOR BROWN: The letter is dated 17th October 1945 and addressed "To whom it may concern. I, the undersigned, Johanna Thorose Kurd of Jewish parentage, of Dutch nationality, declare herewith to have been imprisoned by the Germans, first in Westerbork, Holland, from May 20th, 1943, until February 15th, 1944, thereafter at Bergen-Belsen until liberated by the English Forces. During the period of imprisonment in Belsen I have been put to work in the SS kitchen for the first 8 months where Fritz Mattes (spelling phonetic) was one of the SS men overseers. His photograph in the papers as one of the SS honchman now before the court gave me the impulse to declare the following in his defense:

- 1st. At first he was common Wohrmachtman who often cursed the Hitler regime. Later he apparently had been bombarded to SS man of which 'promotion' he often spoke with disgust.
- 2nd. He always told me the radio news from the allied side in regard to the War events.
- 3rd. He never even touched me or any of the other prisoners; to the contrary treated us very kindly and even brought prisoners, working in the cellar peeling potatoes and cleaning vegetables, whenever he saw a chance to do so, some sausage meat or other extras.
- 4th. He certainly never mistreated anybody in my presence, neither did I hear of any such cases.

I wish to bring these matters to the attention of his judges in order that justice may be done and my statement can be supported by other girls whose names I will gladly give if necessary. Inasmuch as my father died in Bergen-Belsen and my mother shortly after liberation as a result of undernourishment, etc., I certainly have no friendly feelings towards those who are actually guilty, but to the best of my knowledge the above named Fritz Mattes does not belong to them. Expecting that you will give my testimony due considerations, Respectfully yours, J.T. Kurd". I have had that letter translated into German and given to the accused. He is the only one who is affected by it.

THE PRESIDENT: The next witness for whom permission was asked to call concern both Captain Fielden and Captain Corbally. The witness was the Burgomaster of Gross Hohlen.

CAPT. FIELDEN: Yes, there are two witnesses both of whom are here, and I propose first to call the Burgomaster.

HEINRICH BRAUNER is called in and having been duly sworn is examined by CAPTAIN FIELDEN as follows:-

- Q What is your full name ? A. Heinrich Brauner.
- Q Is your address 144 Gross Hohlen, near Colle ? A. Yes.
- Q Are you the Burgomaster of Gross Hohlen ? A. Yes.
- Q Do you remember a party of concentration camp prisoners being in Gross Hohlen in April of this year ? A. Yes.

Q What date was that ? A. 10th April.

Q Did you see them leave the village ? A. Yes.

Q What time did they leave the village ? A. 2100 hours.

Q Did you hear any more about them that day ? A. No.

Q When did the British troops arrive in Gross Hohlon ? A. 12th April.

Q When was the next occasion that you were concerned with the concentration camp prisoners ? A. Eight weeks later a commission arrived to enquire into the bodies which were found there.

Q Where were they found ? A. One kilometre from Gross Hohlon; three bodies were found.

Q When were they found ? A. I do not remember the exact date.

Q Were these bodies found by this commission which -----

COL. BACKHOUSE: I must ask my friend not to load.

CAPT. FIELDEN: Who found these bodies ? A. The inhabitants of the village.

Q About how long after the concentration camp prisoners had passed through the village were these bodies found ? A. Six to eight weeks afterwards.

Q What happened to the bodies ? A. They were disinterred and then buried in a churchyard of Gross Hohlon.

Q Were you present when they were disinterred ? A. Yes.

Q How were the bodies clothed ? A. They had striped prisoners' clothing and they were wrapped in blankets.

Q Do you know of any other parties of concentration camp prisoners passing through Gross Hohlon in April ? A. No.

Q Do you know how the persons who were disinterred came to their end ? A. No.

MAJOR WINWOOD: No questions.

MAJOR MUNRO: No questions.

MAJOR CRANFIELD: No questions.

CAPT. ROBERTS: No questions.

MAJOR BROWN: No questions.

Cross-examined by CAPTAIN CORBALLY

Q On this night of 10th April do you know how far away the battle front was ? A. No.

Q Did you hear any sounds which you took to be gunfire or demolitions or anything of that sort ? A. Yes.

Q Were there many German troops in and about the village of Gross Hohlon ? A. I did not see any.

Q You said on the 12th April British troops entered the village. Was that in the morning, afternoon, or night time ? A. In the afternoon.

Q So it was not quite 48 hours after this incident happened; is that right ?
A. Yes.

CAPT. NEAVE: No questions.

CAPT. PHILLIPS: No questions.

CAPT. BOYD: No questions.

CAPT. MUNRO: No questions.

LT. JEDZIEJOWICZ: No questions.

Cross-examined by COLONEL BACKHOUSE

Q You say you saw those concentration camp prisoners leaving Gross Hohlon ?
A. Yes.

Q Did they march out ? A. They marched off.

Q Did they march off in an orderly fashion ? A. I did not see that.

Q Did you see them go ? A. No, I saw how they were fallen in.

Q Were they fallen in by their guards ? A. Probably the guards.

Q Did they fall in in ranks of five ? A. I do not know.

Q Did they fall into some sort of orderly formation ? A. They stood in a heap, crowded; not in formation.

Q Did they all stand there waiting for the order to move off ? A. I do not know.

Q Did you see it or did you not ? A. I saw only that the prisoners were fallen/and they stood there waiting.

Q Then after they had been standing there waiting for a little while did they all start to march away ? A. I did not see that. I went away.

Q You went away leaving the prisoners standing there waiting to move off ?
A. Yes.

Q Were there guards standing around them ? A. I did not see them.

Q Did you hear any shooting ? A. No.

Q Just where exactly is Gross Hohlon ? A. Three and a half kilometres from Celle to the north.

Q Is it on the main road north ? A. Yes, towards Hamburg.

Q If all these prisoners we have heard about had marched up from Hanover they would all have to pass through there, would not they ? A. I saw only the one transport.

Q If I am wrong you tell me, but it is on the main road from Hanover up to Bremen, is not it ? A. Yes.

Q Regarding those three bodies which were found, did you as Burgomaster or anybody else know anythin' about any prisoners having been killed in your village? ... I do not know anything about it. I became Burgomaster at the end of the month of May. I was not Burgomaster at that time.

Q You say that you were present when those bodies were disinterred and then taken to be reburied. Have you any idea who buried them the first time? A. No.

Q You have told us that you do not know how they died, but it was obvious that all three had been shot, was not it? A. I cannot say anything about that.

Q Do you know who this commission was who came down? A. British and French officers.

Q You never saw or heard how those people were killed? A. No.

Q Did not you hear that they had all been shot in the back of the head? A. No.

Q And you say on the night of the 10th April when you saw those prisoners first go away there were not any German troops about in the village? A. I did not see any.

Q Really the only body of people in the village other than the village people were those prisoners and their guards? A. Yes, as far as I have seen.

Q You actually saw them form up and fall in ready to march off? A. Yes.

Q When you left they were still standing there waiting for the order to march off? A. Yes.

Re-examined by CAPTAIN FIELDEN

Q Whilst the prisoners were standing together before they moved off how far away from them were you? A. About 300 metres.

Q Can you tell the court how light or dark it was at that time? A. There was still light.

Q Was there still normal daylight? A. It was just the approach of the evening.

Q Did you actually see the prisoners leave away from where they were standing to leave the village? A. No, I have seen them only standing.

THE JUDGE ADVOCATE: Do you know why these prisoners left Gross Hohlon and did not stay the night there? A. No.

Q Did you know that they were going to stay the night there, that that was the original intention? A. No, I did not hear anything.

Q You say you were present when these bodies were taken out of the ground. Did not you want to discover how they had died? A. One could not recognise the reason of their death any more.

Q Did you take them out of the blankets or not? A. The brain was already in liquid form and one could not recognise anything any more.

Q Could you tell whether they were men or women ? A. Only because of their identity discs; not otherwise.

Q Did you discover whether they had any numbers on them or anything that could identify them ? A. This commission which came there removed the numbers from their tunics.

Q You do not know whether they were men or women ? A. I do not know. Only by their identity discs was it feasible and the commission took note of whether they were men or women.

A MEMBER OF THE COURT: Was there any sign of blood on the clothing ? A. I did not see any.

ANOTHER MEMBER: Can you tell us what the prisoners were doing before they fell in ? A. No, I do not know.

Q You were not there ? A. No.

THE PRESIDENT: Have you any questions arising out of that ?

CAPT. FIELDEN: No.

(The witness withdraws)

CAPT. FIELDEN: The other witness is Albert Tusch.

ALBERT TUSCH is called in and having been duly sworn is examined by CAPTAIN FIELDEN as follows:-

Q What is your full name ? A. Albert Tusch.

Q Is your address 20 Gross Hohlon, near Celle ? A. Yes.

Q What is your occupation ? A. A farmer.

Q Were there any German troops in Gross Hohlon in April of this year ? A. Yes.

Q Do you know what kind of troops they were ? A. They were supposed to be SS troops.

Q Do you know when or about when they arrived in Gross Hohlon ? A. On the 10th April; they may have arrived three or four days beforehand.

Q When did they leave the village ? A. On the 11th April.

Q Do you remember a party of concentration camp prisoners being in Gross Hohlon in April of this year ? A. Yes.

Q What date was this ? A. On the 10th April.

Q Did you become connected with those prisoners in any way ? A. No.

Q Do you know when the prisoners left the village ? A. About 2100 hours the same day.

Q Were you present when they left ? A. No.

Q Do you know why they left ? A. I heard that they had to go to another place.

Q Do you know where they went to ? A. To the airfield Hustedt.

Q How far away from Gross Hohlen is that ? A. Six kilometres.

Q How do you know they went there ? A. I had to bring their food along and that is how I saw them going into the huts there.

Q Do you know of any other parties of concentration camp prisoners at Gross Hohlen in April ? A. No, I certainly do not think so.

Q Did you actually see this party arrive in the village on the 10th ? A. Yes.

Q Can you describe to the court their general appearance ? A. I was about 100 metres away from them but I saw they looked tired and rather weak.

MAJOR WINWOOD: No questions.

MAJOR MUNRO: No questions.

MAJOR CRANFIELD: No questions.

CAPT. ROBERTS: No questions.

MAJOR BROWN: No questions.

Cross-examined by CAPTAIN CORBALLY

Q In what part of the airfield were the prisoners when you arrived there that night ? A. They were walking across the airfield.

Q After they had crossed the airfield where did they go ? A. In these huts.

Q Do you know what that hut or huts had been used for ? A. I believe previously prisoners belonging to a working party had been in there because they were surrounded by barbed wire.

Q How far is this place from the village of Gross Hohlen ? A. Six kilometres.

Q When you handed over the food to the column of prisoners did you hear of any incidents having happened between Gross Hohlen and the place where they were ? A. No.

Q How did you come to be taking the prisoners food from Gross Hohlen to the airfield ? A. Three or four SS men came to me and told me to bring the food to Wolthausen.

Q From where did you collect the food ? A. From the place in Gross Hohlen where the prisoners were stationed.

Q What was that place ? A. A farmyard.

Q What sort of food was it that you found there ? A. There were several sacks, some of them containing bread, others sugar and rice, and something else.

Q You said that prisoners struck you as looking tired. Did they strike you as looking half starved and sick ? A. No.

Q Was not it rather an impression of a man who has walked about 40 kilometres and who, at the end of the journey, is tired and wants to lie down ? A. Yes.

CAPT. NEAVE: No questions.

CAPT. PHILLIPS: No questions.

CAPT. BOYD: No questions.

CAPT. MUNRO: No questions.

LT. JEDRZEJOWICZ: No questions.

COL. BACKHOUSE: No cross-examination.

THE JUDGE ADVOCATE: Where did you get those orders to take the food from the farmyard up to the airfield ? A. In my house, No.20 Gross Hohlen.

Q Was it an officer or a man or an N.C.O. who gave you this order ? A. It was not an officer; it may have been an N.C.O. or a private, I do not know.

Q Do you think you would know him again if you saw him ? A. No.

A MEMBER OF THE COURT: When you went to the farmyard to collect food were there signs of disorder there ? A. No, the sacks I had to collect were piled up and ready to take away.

Q Had all the prisoners gone by then ? A. Yes.

Q Were there many SS left there ? A. As I arrived there were four or five to help me load the stuff.

Q Did they seem to be hurrying ? A. No, I did not get that impression.

Q Can you remember how many sacks there were loaded on to your cart ? A. About 20.

ANOTHER MEMBER: Was it dark when you drove up the road ? A. Yes.

Q Did you see anything on the road, any bodies or anything ? A. No.

Q Did you hear any shooting ? A. No.

THE JUDGE ADVOCATE: Which road do you take when you go from Gross Hohlen to this airfield ? A. We first went in the direction of Wolthausen because I was told to go there, but then I came to a bridge and the sentry there told me I could not pass so I had to go the other way round.

Re-examined by CAPTAIN FIELDEN

Q What time was it when you received the orders to move the prisoners food ? A. About nine.

Q What time was it when you were in the farmyard loading the food on to your cart ? A. I was told to be there at 21.30. It may have been a bit later. We drove off about 2200 hours.

(The witness withdraws)

THE PRESIDENT: Those are the additional witnesses who the court agreed to hear, ending with this Albert Tusch. The court propose to call one witness, and there is, of course, this document and Schreirer.

CAPT. CORBALLY: Yes. I will call him now.

The Accused HEINRICH SCHREIRER is recalled on his former oath and is further examined by CAPT. CORBALLY as follows:

Q. When you were arrested were any documents and papers taken from you? A. Yes.

Q. Were they in a sort of wallet? A. Yes.

Q. Was it just one wallet or two? Can you say what sort of wallet it was? A. Two.

Q. Is that one of the wallets which was in your possession when you were arrested? (Handed) A. Yes.

THE JUDGE ADVOCATE: Do you want to make an exhibit of it?

CAPT. CORBALLY: I understand it will be necessary to do so, because there are various contents of this wallet which my friend wants to ask about.

THE PRESIDENT: I think the easiest thing would be to wait and make it an exhibit later.

CAPT. CORBALLY: (To the witness) Will you look at those three documents? (Handed) A. That is a certificate which I received in Celle, No. 3. Certificate of my German nationality, No. 2, and Red Cross certificate of the German wehrmacht.

Q. First of all I want you to explain how you came into possession ----

THE JUDGE ADVOCATE: Will we have to have them read to us?

CAPT. CORBALLY: As soon as he explains how he came to be in possession of this I will read it. (To the witness) I want you to explain how you came to be in possession of the Red Cross certificate. A. I got that from Dr. Fogt in Neu-Strelitz, and these Red Cross certificates are issued only to field troops.

Q. Can you remember the date on which you got it? A. The beginning of April 1945.

CAPT. CORBALLY: I propose to read this to the court: "German Army, G.H.Q., Army, Chief of the Army Medical Service. Service card No. 263297. The medical orderly Cpl. Heinrich Schreier. Date of birth: 11th June 1923. Place of birth Mirzawoda, is exclusively in the medical service of the army as medical orderly. The holder is authorised to wear the Geneva sign, and stands under the protection of Articles 9, 12, 13 and 21 of the Geneva Convention of 7th July 1929. Written out on the 6th April 1945, by instruction" of an officer whose signature I cannot decipher. He is described as Chief field doctor. Divisional doctor. Then the signature of Schreier, and on the back a lot of extracts from the Geneva Convention.

COL. BACKHOUSE: His rank is also on it. His rank is Obersturmbannfuhrer.

CAPT. CORBALLY: The other document is the naturalisation certification, and I have also had an English translation prepared. This says: "German Reich. Document of naturalisation. The widow Maria Schreier, born Ilowski, in Bruchsal, born on the 21st March 1880, in Pascani, District Baia, Rumania, and the following by the strength of her parental authority legally represented child. Heinrich. Born on the 11th June 1923 in Mircea Voda, have acquired German citizenship by naturalisation with the moment of delivery of this document. The naturalisation extends only to the above-mentioned family relations. 16th September 1941" - then there is some sort of initial,

"The Reichsminister of the Interior, the Special Commissioner." The third document which I wish to put in is the certificate which he states he received in Celle. It is, in fact, a sort of movement order. It does not mention him by name but he states he received it. It is written in German and in English.

COL. BACKHOUSE: It is an order directing him to work in the hospital.

CAPT. CORBALLY: Yes. "The one medical orderly is herewith sending at the Seeckt barracks, Celle. This direction is given by the British S.M.O., Celle. At the barracks he must announce to the German Medical Doctor, Celle, 6th May 1945." Signed by Dr. Albrecht, who is described as Oberfeldarzt.

(Three documents are marked Exhibit 150, signed by the President and attached to the proceedings).

CAPT. CORBALLY: Just one more question. In that wallet do you recognise all the things as having belonged to you? A. No, there are a few photos there which do not belong to me.

Q. And does that wallet contain all the things which you had taken from you when you were arrested? A. No.

(The remaining defending officers do not wish to cross-examine this witness).

Further cross-examined by COL. BACKHOUSE.

Q. When did you first have one of these Red Cross cards? A. The beginning of April.

Q. That is the first time you ever had one? A. Yes.

Q. Although you have been a medical orderly for about four years? A. Yes, that is a sort of certificate which is only handed out when one gets into the front line.

Q. You left Norway in February and served as infantry from then on, did not you, according to you? A. 1945.

Q. Why did not you get one then if your story is true? A. I do not know.

Q. Let me suggest to you that there is one mistake made, and that is the rank of the doctor who is supposed to have signed it is an S.S. rank. A. That is the signature of the doctor and the doctor may be asked whether it is right or not.

Q. When the political department of the S.S. and when the Gestapo broke up everyone of your members was supplied with false papers, was not he?

A. I am convinced that even the prosecutor does believe it that I am a member of the Gestapo or the political department.

Q. Is your mother really Romanian? A. Yes.

Q. Or is she Polish? A. She is of Polish origin.

Q. When did she come from Poland to Rumania, do you know? A. She was born in Rumania.

Q. Has not she told you that she comes of a very good Polish family and had to fly into Rumania from Poland? A. No, that is fantasy. I do not know where you get it from.

Q. Your mother speaks very good Polish indeed, does not she? A. Yes.

Q. You speak Polish too, do not you? A. No, I do not speak Polish.

Q. Were not you employed in the political department both in Auschwitz and in Belsen? A. No.

Q. You say that some of these documents do not belong to you at all. Just look at this photograph. Is this one of the ones that do not belong to you? (Photograph handed) A. Yes, that is mine.

Q. Who is this? A. A friend of mine, her name is Christl.

Q. Were you in Linz with her in February of this year? A. No.

Q. Linz is, of course, where your mother lives, is not it? A. Yes.

Q. When did you first meet this girl Christl? A. Long ago, 1941 or 1942.

Q. Where did you meet her? A. In Linz.

Q. You just saw her in 1941 or 1942 and did not see her again until when? A. When I went on leave I saw her again.

Q. That was when? A. 1943 or 1944, and I was in correspondence; I wrote her letters.

Q. You know that on the back of this photograph she has put: "Thank's for the many happy hours in Linz from Christl" and has dated that the 20th February this year, has not she? A. Yes, that is so.

Q. And there is a theatre ticket in your wallet too for the 18th February 1945, also in Linz, is not there? A. Yes.

Q. Were not you at the theatre with her in Linz? A. No, I was not.

Q. Did she send you the theatre ticket as well? A. Yes, that is a very intimate affair and I would like to ask the court whether I have to answer that.

Q. I am not worried; you need not tell us anything you do not want to. A theatre ticket is a funny thing to be writing letters on, is not it? A. No, that is a sort of slogan, it is not a letter; it is a private slogan.

Q. I thought the other photograph of you in your uniform was a photograph with your fiancee. This is a totally different girl, is not it? A. Yes, that is another girl.

Q. Where is Schupmannshoeh? A. I am not sure; either in the vicinity of Stettin or of Hamburg.

Q. How did you get this letter addressed to you from that address dated the 22nd April 1945? A. Through a German comrade of mine.

Q. When did you get it? A. I am not quite sure; in April I believe.

Q. Where were you when you got it? A. In the front line.

Q. But you had already surrendered, according to you, before that letter was ever written.

THE JUDGE ADVOCATE: He laid down his arms on the 20th April.

COL. BACKHOUSE: Yes. This letter is the 22nd April. How did you get that letter? A. I said already, through a comrade.

Q. Who was the comrade? A. Cpl. H. Eger.

Q. Where were you when he gave it to you? A. In the front line.

Q. So you got it some days before it was written, did you? A. There is a

letter from my comrade, whom I mentioned, and there is a letter from the girl, so the dates can be verified through those letters.

Q. I am afraid I have not got any letter from the girl, but the letter from your comrade is dated 22nd April. A. I got that letter in April and I am not sure about the date. At the time I was in the front line, and then I took part in the whole withdrawal, and what that means I do not need to say.

THE PRESIDENT: Do you think this witness understands what you are asking? As I understand it, and I think the court too, he has already said he laid down his arms and was made a prisoner of war about the 20th April 1945, and this letter which you are producing is dated the 22nd. I cannot understand what he has replied to; he seems to be avoiding the question.

COL. BACKHOUSE: I do not think I can make it any clearer. (To the witness) Of course there is no explanation, is there, if you really surrendered in the front line on the 20th April, of having in your possession a letter dated 22nd April? A. The explanation is I do not know the dates. When I was arrested and when I was questioned I said at that time I do not remember exactly the dates.

Q. Was not this letter addressed to you at Bergen-Belsen? A. No.

Q. As a matter of fact when did you really last see this girl Christl? A. When I was on leave in 1944; it was in the month of May.

Q. Did not you and the man who wrote you this letter spend a great deal of time with Christl and another girl? A. No, that was again another girl.

Q. Was her name Christl too, by a curious coincidence? A. There must be a letter from this girl Christl in my wallet.

Q. Do you mean the letter which was supposed to be enclosed with this one dated 22nd April? A. Yes.

Q. I put it to you again, if it is the same Christl we are talking about, that you and the man who wrote this letter used to spend a lot of time with this girl Christl and another girl called Elli? A. Elli is sister of another Christl, not this one, another girl called Christl.

Q. So the letter which you received about Christl is really about Elli's sister, who is a different Christl altogether? A. Yes. Of course you can compare the signatures and the handwritings of the two different Christls, and you will find out they are two different girls.

Q. Which Christl had written the letter which was enclosed with this one? A. I do not know her name exactly - Sack I believe.

Q. You do not know her name exactly? A. No, I cannot remember, Sack or Sahn.

Q. But were not you thinking of marrying the girl? I am asking you a serious question and I would like a serious answer. A. No.

Q. That is what this letter is, is not it, an appeal to you to marry her from your friend? A. Yes, that is true.

Q. And you say that is a different Christl to the one who is sending you a theatre ticket dated 18th February and a photograph thanking you for the happy hours dated 20th February, both from Linz? A. Yes, that is another one. I was a soldier and I had my amusement.

Q. When were you in Soltau? A. I do not know Soltau.

Q. Your nickname was Heinz, was not it? A. Yes.

Q. Kopper called it Hansi. That is about the nearest you would get to it in Polish, is not it? A. No, this creature did not call me Hansi at all.

Q. That is what she has told us your name was and that is what you were known to her as. Tell me, do you know a girl called Ilse Fischer? A. Yes, it is possible that I know her.

Q. Well, do you or do not you? A. If I see the photo I can say yes or no. (Photo handed to witness) Yes, I know her.

Q. Do you still say you have never been in Soltau? A. No. I can explain this photo.

Q. Never mind explaining. For the moment answer my questions. You will explain afterwards, if necessary. Tell me, when did you get to know this girl Ilse Fischer? A. February or March 1945.

Q. Now let me just read you what the inscription on the back says: "My dear Heinz, for permanent memory of a night in Soltau." Soltau is the next town to Bergen-Belsen, is not it, and you met the girl in February? A. I can only say I have not been in Bergen-Belsen.

Q. Why on earth should a girl write on the back of a photograph to you: "In permanent memory of a happy night in Soltau" if you have never been in Soltau with her? A. I do not know how the name Soltau comes on the back of this photo. I had to do a journey on duty and then I had to stop on a station near Neu-Strelitz.

Q. Let me just suggest this to you finally, that you have made the great mistake of having too many photographs of too many girls. There is the one which shows you in the S.S. uniform; there is another that makes it quite clear you were in Linz in February this year, and there is another one which shows you were in Soltau in February of this year, and that is quite inconsistent with the story you have told. A. I can only say that that girl on the photo where I am wearing S.S. uniform was my real fiancee. I am a soldier and I had my amusement, and I had my good time, and I kept the photos. Every soldier has got the same things only he is not in front of the court for that.

Q. Let me suggest this to you, that with your knowledge of languages you were employed in the S.S. in the political department. A. That is untrue. I do not know any languages apart from Russian and German. I want only to add that Capt. Fox when he interrogated me confronted me with some clerks, girls, who were working in the political department and nobody recognised me.

Q. Let me suggest this to you, that before the rest of the S.S. went away you left Bergen-Belsen armed with your false papers. A. No, that is not true.

Q. Tell me this. How did you come to be in possession of all these photographs belonging quite obviously to an English soldier? A. They do not belong to me.

Q. How did they come to be in your wallet? A. I do not know. Quite a number of other things are missing.

Q. Do you say those never belonged to you at all? A. No.

CAPT. CORBALLY: Is the wallet going in?

COL. BACKHOUSE: I will put in what my friend wants me to. If my friend wants the rest to go in -----

THE PRESIDENT: We want in everything referred to.

COL. BACKHOUSE: I can put them formally to the witness if necessary.

THE PRESIDENT: Do you wish it?

CAPT. CORBALLY: I would sooner it all went in.

COL. BACKHOUSE: Perhaps the best thing is if I collect together what I referred to, and if my friend wants any more to put in what he wants.

THE JUDGE ADVOCATE: You give us what you want put in and Capt. Corbally can put in what he wants.

THE PRESIDENT: You produce three documents, Capt. Corbally, and the prosecutor has talked about certain photographs.

COL. BACKHOUSE: The best thing is, first of all, I will pass back the ones which are already in. Then here is the photograph which I have mentioned, which has got the date 20th February 1945, and the theatre ticket dated 18th February 1945 with a message on the back. Here is the Ilse Fischer one with "the night in Soltau" on the back. I did not hand in these, but here is the selection of photographs which quite obviously belong to some British soldier. He does say they are not his. Here is the letter which I referred to. There is a translation which my friend, Major Stewart, has made while it has been going along. I have not been able to read his writing yet, so I do not think the court will be able to. Here is the original letter, and what I could do is hand in the script translation and have it typed out afterwards.

THE PRESIDENT: Yes.

COL. BACKHOUSE: Here is the other document which Capt. Corbally produced.

I have not cross-examined on it, it is the one directing him to go to work in the hospital. That is all I think I have referred to, and I will give my friend the rest of the wallet, and if there is anything else he

wants to go in he can put it in.

THE PRESIDENT: What I have at present is, one, a translation and a letter

handed in; two, this photograph which refers on the back to the night in

Soltau, and, three, the photograph and the theatre ticket, together. The

last thing is a bundle of photographs of which some are quite obviously

English.

COL. BACKHOUSE: That is all.

Re-examined by CAPT. CORBALLY.

Q You have been questioned about the date on which you surrendered. How long after you surrendered did you arrive in Celle? A. Four, five or six days.

Q Do you mean four days at the least and six days at the most? A. Yes.

Q How long were you in Celle when you received the movement order from Dr. Albrecht at the Seect hospital? A. I got this order at once; I handed over the wounded and got this order.

Q You have seen the date on that certificate. Can you tell the Court exactly from that, working it out from that date, the date of your capture? A. In the beginning of May.

THE JUDGE ADVOCATE: What date is he giving?

CAPT. CORBALLY: The beginning of May.

THE JUDGE ADVOCATE: For what?

CAPT. CORBALLY: The date on which he was captured.

THE JUDGE ADVOCATE: Then he was captured?

CAPT. CORBALLY: Yes.

THE JUDGE ADVOCATE: He now wants to say it is the beginning of May?

CAPT. CORBALLY: About the beginning of May, yes. (To the witness): I want to ask you about your medical card. You have been asked as to why you never received a medical card before this year. Have you ever before the beginning of this year been engaged in front line operations? A. No.

Q Who gave you this medical card? A. Dr. Vogt.

Q You have been asked about how you came to be in Soltau. At the time that photograph was taken where was your unit stationed? A. Neu-Strelitz.

THE JUDGE ADVOCATE: Where is that?

CAPT. CORBALLY: As far as I know it is in the province of Mecklenburg. (To the witness): How far is it from Schwerin? A. About 80 kilometres from Schwerin in the province of Mecklenburg.

Q This place Soltau; how far is that from Neu-Strelitz? A. I do not know.

Q How long would it take you to get there? A. I have never been in Soltau.

Q After you spent the night in this town where you received that photograph -- maybe a town or village in that place -- how far away from that place was your unit? A. 25 to 30 kilometres away.

Q Is that the place where you met this girl? A. Yes.

Q What sort of a place was it? A. A sort of small station.

Q Were there many houses? A. Yes.

Q Shops? A. It was night, I do not know, I had no connection; I could not continue my journey so I stayed there and that is why I met this girl.

Q Would you describe it as a town or village? A. A small town, not a big town.

Q The prosecutor has put it to you that you left Belsen before the British arrived equipped with false papers. When you were arrested did you have any papers referring to you by name? A. Those three documents which were handed to the Court.

Q Is not your name Heinrich Schreirer? A. Yes.

Q And is not it true you were born in Mirceah Voda in Rumania in June, 1943? A. Yes.

CAPT. CORBALLY: The accused has already recognised this wallet as his. I would just like to hand the rest of it in as an exhibit.

THE PRESIDENT: What exactly for? Merely as a wallet having been recognised by him?

CAPT. CORBALLY: Yes.

COL. BACKHOUSE: He says some of the contents are not his. I wanted to keep them separate. I do not know whether he wants to sort through it.

THE PRESIDENT: I am not clear why you are putting it in. Nothing has come out in evidence about it.

CAPT. CORBALLY: That is quite true. I felt that if part of the wallet goes in the whole should go in. I am not making any point on it at all.

COL. BACKHOUSE: I am raising no objection to it.

THE PRESIDENT: There has been nothing in evidence about it. I cannot see the object to handing the wallet in to the Court. There will not be anything the Court can do with it.

CAPT. CORBALLY: No. It seems to me that if part of the contents of what has been recognised by the accused as his wallet are handed in the whole should be. I am not pressing it at all; it just occurred to me it was the proper thing to do.

THE PRESIDENT: I am perfectly happy not to have the wallet in.

THE JUDGE ADVOCATE: (To the witness): This photograph which is signed Ilse Fisher; you say you know this girl? A. Yes.

Q Where did you meet her? A. I do not know the name of the place. That was on my journey which I described before.

Q Do you mean you have only seen her once in your life and that is all? A. Yes.

Q And did she give you the photograph then? A. Yes.

Q Or did she send it to you? A. No, she gave it to me on the spot.

Q Did she give it to you with this writing on the back? A. Yes.

Q Did not you realise she was writing apparently commemorating a night which you spent together in some place which was called Soltau? A. I did not think at that time of the name of the place at all; if she says so I did not think about it.

Q Did you realise she had put a name on this photograph? A. Yes.

THE PRESIDENT: Have you any questions on that?

CAPT. CORBALLY: No.

(The accused Schreirer leaves the place from which he has given his evidence.)

THE PRESIDENT: That, I think, concludes the additional witnesses who were called by the defence and the Court now proposes to call one witness who is the medical officer of the Court in order to put certain questions to him.

CAPT. D.H.J. WILLIAMS is called in and, having been duly sworn, is questioned as follows:-

THE PRESIDENT: What is your full name? A. David Hubert James Williams.

Q. What is your rank and unit? A. Captain, R.A.M.C.

Q. When and where did you qualify? A. From Guy's Hospital, London, on the 18th January, 1943.

Q. How are you at present employed? A. As medical officer to the Court here.

Q. Have you, in accordance with instructions, examined certain of the accused? A. Yes.

Q. Which of them have you examined? A. If I may I would like to refer to certain notes which I took at the time?

Q. Yes. A. I examined No. 5 Hoessler, No. 14 Schmitz, No. 25 Stofel and No. 26 Schreirer. I also examined No. 46 Kopper.

Q. Have you as well examined any of the witnesses who have appeared before this Court? A. Yes.

Q. Who? A. The lady who appeared here as a witness for Schreirer, his mother.

Q. We will take each of the accused whom you have examined separately. First of all the men accused. I want you to tell the Court if you found any marks on them and then tell the Court the position, the size, the shape, or design, and the colour of any of those marks. Take first of all No. 5 Hoessler. A. I examined No. 5 Hoessler with a view to determining whether there were any tattoo marks on his body. Underneath his left armpit about one inch down on the medial side of the arm I discovered a tattoo mark, linear strokes of about $\frac{1}{8}$ inch long shaped to form the letter "O". This was about $\frac{1}{4}$ across. It was blue-black in colour. There were no other marks.

Q. Do I understand from my notes that that really consists of a blue-black "O" about $\frac{1}{2}$ inch across and that the "O" is made merely by making small cuts about $\frac{1}{8}$ inch broad? A. Yes, that is right.

Q. Now take the accused No. 14, Schmitz. What marks did he have on him, if any? A. I examined him thoroughly and found no tattoo marks at all on his body.

Q. Now take the accused No. 25 Stofel. Did you find any marks on him? A. On the medial side of the left arm about three inches down from the axilla armpit I found the letter "B" also formed by short straight strokes.

Q. What was the colour of that? A. This also was blue-black.

Q. What was the size? A. It was about $\frac{1}{3}$ of an inch from top to bottom.

Q. About how broad would it be? A. A little less than a quarter. There were no other markings.

Q Now take No. 26 Schreirer. What markings did you find on him? A. On the medial side of his left arm about one inch down from the axilla armpit I found a letter "A".

Q How was that made and what was its size? A. This had been formed by a series of tiny little pin-prick punctures. It was $\frac{1}{3}$ inch from the tip to the base and about a $\frac{1}{4}$ of an inch across at the base.

Q What colour was it? A. This was also blue-black but fainter than the others.

Q Did you find any other marks on him? A. There were no other marks.

Q This "O", "B" and "A" which you have referred to as finding on the three accused, were they what we might call capital letters? A. Yes, they were capital letters.

Q In addition you examined Frau Schreirer? A. I did.

Q Did you find any marks on her? A. Yes.

Q Will you describe what those marks were? A. About one inch down on the medial side of the left arm from the armpit I discovered the letter "A" tattooed.

Q How had it been made and what was its size? A. It appeared to have been made by a series of pin-prick punctures $\frac{1}{3}$ of an inch from the tip to the base and about a $\frac{1}{4}$ inch across at the base.

Q What was its colour? A. Blue-black.

Q Had she any other tattoo marks on her? A. I did not discover any.

Q The two "A's" you discovered, one on Schreirer and the other on Frau Schreirer; were they what I might call the same, as it were - had they the same make and composition? They had both been made with dots and were about the same width and that sort of thing? A. Yes.

Q You stated that the mark on Schreirer appeared to be rather faint. What did you consider the mark on his mother to be? A. Exactly the same.

Q Now take the accused No. 46, Kopper. What marks, if any, did you find on her body? A. On the bridge of her nose there is a faint transverse scar about $\frac{1}{4}$ inch long. On the medial side of her left elbow there was also a scar. It was about one inch long and about $\frac{1}{4}$ inch across. This was in the form of a rough triangle and at each angle there appeared to be a point of more intense scarification. There was also, about three inches up the forearm from the wrist, a very faint scar which one could not really define but there seemed to have been at some time a break in the skin surface. All the marks were on the left arm. There were no other marks or scars.

Q From your own professional knowledge as a doctor and from the scars as you saw them have you any opinion as to how these scars could have been caused? A. The scar on the left elbow could conceivably have been caused by the teeth of a dog, the scar on the bridge of her nose by a blow - whether it was with an instrument or the hand I cannot determine - the scar on her forearm was consistent with a scratch perhaps by the foot of a dog.

THE PRESIDENT: Are there any questions on that?

MAJOR WINWOOD: No.

MAJOR MUNRO: No.

Cross-examined by MAJOR CRANFIELD.

Q You said that one scar might conceivably have been caused by a dog's teeth and one scar might perhaps have been caused by a dog's claw. Has it been suggested to you that those scars were caused by a dog? A. The accused Kopper herself told me that these scars were caused by a dog-bite on the elbow and the scratch mark down the wrist.

Cross-examined by CAPT. ROBERTS.

Q In her evidence Kopper said: "I am suffering not from headaches but a bladder disease and I am under the treatment of a British doctor". Are you now treating the accused Kopper for a bladder disease? A. No.

THE JUDGE ADVOCATE: What is the date of that evidence?

CAPT. ROBERTS: The date of her evidence was the 2nd November.

THE JUDGE ADVOCATE: (To the witness): Were you the medical officer on that day? A. Yes.

(The remaining defending officers do not desire to cross-examine this witness.)

Cross-examined by COL. BACKHOUSE.

Q I suppose Kopper is under your observation, is not she? A. Yes.

Q Have you examined any of the other men in the dock? A. Only in a general way.

Q I was wondering whether you had examined any of the people who joined the S.S. at a later stage than Hoessler and Stofel who both say they joined the S.S. many years ago before the war. You have not examined, say, Kraft or Weingartner? A. No.

THE JUDGE ADVOCATE: You examined both Schreirer and his mother and you said the two marks were very similar, did you not? A. Yes, very similar.

Q Did the tattooing in the case of Hoessler and Stofel appear to be different in any way from the way it had been done in the case of the Schreirers? A. Yes.

Q You have not examined, have you, professionally any large number of S.S. men and Wehrmacht soldiers? A. No.

(The witness withdraws.)

THE PRESIDENT: That was the only witness whom the Court proposed to call, and that has now concluded the whole of the cases, as far as I know, for the defence. Major Cranfield, are you talking as the senior defending officer now?

MAJOR CRANFIELD: No, Col. Smith is now going to address the Court on behalf

of the defence.

COLONEL SMITH: May I take this opportunity, sir, of saying once more that we are very grateful to the Court for the assistance it has given in enabling us to present this argument, and you will understand that I am not merely using words of formal courtesy.

Our task has been made difficult for reasons upon which I will not dwell, since they are not under the control of the Court, but quite apart from that, this case is one of more than ordinary importance, it is of absolutely crucial importance. Everything that say and do here is recorded for all future generations, and what we say at this bar, and to whatever decision the Court will come, will be subject for a long long time to most minute scrutiny by historians and by lawyers and many others.

What is involved here is very much more than the fate of these obscure individuals whom the accident of operations has swept into this dock. What is really involved, I think, is the issue whether our country will be able, in this crisis and in the face of considerable popular clamour, to maintain a reputation which I think she has won and deserved, for upholding the rule of law as between nations in all circumstances. That, I think, is an issue which is clearly before the Court at the moment as well as that of the individual accused.

We are concerned here solely to determine whether these accused are guilty or not guilty of a war crime, a technical expression in the light of International Law. That being so, it followed that a decision that the accused, or any of them, are not guilty of a war crime under the law of Nations, is no bar to any future proceedings and does not prejudice any future proceedings if they are charged upon the same or similar evidence for their acts in Courts administering other law, such as Polish law, German law, or it may be some other.

May I explain that for a moment. You will remember the Moscow Declaration of 1943, when it was provided that the majority of war criminals - that is, excluding the very top level - should be tried in the countries where their crimes were committed, and since a large number of the cases concerned here are Polish, I will begin by saying that every case which originated in Poland, at Auschwitz, can be tried by a Polish Court as an offence against Polish law. I am informed also, on the authority of my friend on my left, that the Polish Courts have also tried people for offences committed against Poland outside Poland under Polish law. That is a common feature of the Continental codes, though it is not in English law.

Furthermore, they can be tried under German law. When I say German law I ought to explain that it means German law under the control of the Military Government. It is important, because whether the cases are tried under Polish law or German law under the Military Government, or under some other, Czech or Hungarian or whatever it may be, the defence which it is now my duty to urge will not be available in those Courts. The reason for that, particularly insofar as the German law is concerned, is that law No. 1 of the Military Government prevents the Courts now from relying upon any law which gives any privilege to the National Socialist Party or which in any way discriminates against people by virtue of their race, religion, etc.

All those Courts are controlled by Military Government in this sense, that if you are dissatisfied with the decision of a German Court, even an acquittal, we can quash the proceedings and try it again under our own Military Government Courts.

I want to make it clear, not only to the Court - who I am sure understand it - but to any others who may be interested, that the function of this Court is limited to trying the case of guilty or not guilty of a war crime. As war crimes deal with the law of Nations such a decision can in no way affect and in no way prejudice any future proceedings if they are arraigned upon the same or similar evidence under Polish, German or any system of law.

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One more preliminary point. Nothing that can be said here, no decision by way of an acquittal, in any way limits the responsibility of the German Government. The German Government, as Article 3 of the Hague Convention says, remains liable for all the acts done in its name, and the German Government is responsible for paying the fullest compensation to every non-German subject who has suffered in these concentration camps, or to the dependents of those who have perished. I shall have occasion from time to time during my remarks to emphasise the immense importance of this distinction between the responsibility of the State and the responsibility of the individual. I mention it now merely by way of preliminary in order to emphasise that the function of this Court is limited to a particular job and that nothing we do here can in any way affect what may subsequently be decided by other authorities.

Now I want to sketch in, if the Court will bear with me, a kind of background in outline to the general argument which I shall try to present. I have said that this Court administers only International Law. I wish, if I may, just to expound that for a minute or two.

Our Court is exactly similar to the Prize Court which sits in time of war to decide upon the legality or illegality of captures made by His Majesty's ships. It is, I think, exactly on all four's in the sense that the Prize Court is constituted by the King's Commission; it is a British Court purely for that purpose.

Having been constituted by the King it does not administer a law laid down by the King or by Parliament, but it administers the law of Nations. Now that is precisely the position of this Court. It is constituted by Royal Warrant and the Royal Warrant lays down the procedure to be followed by the Court, just as the Order in Council lays down the procedure to be followed by the Court of Prize. But neither the one Court nor the other will take its law, as distinct from procedure, from the King or from Parliament. Parliament could intervene, but Parliament does not.

That is made very clear in a case which will be familiar to the learned Judge Advocate, the case of Zamora, which is reported in 1916 2 Appeal Cases at page 77, in which the question in issue was whether the Prize Court was bound by certain rules laid down by Order in Council, and the Privy Council said with considerable emphasis that the Prize Court could not be bound by an Order in Council so far as the law was concerned; it could be bound like every other Court by an Act of Parliament, but there was none in issue.

Exactly in the same way it is clear this Court must use its own judgment independent of the Manual of Military Law and of any other authority whatsoever.

That brings me to another point. In the Regulations you will find - I think it is under Regulation 8(3) - that the Court takes judicial notice of the Laws and Usages of War. I propose, if I may, to dwell upon that for one minute, because I really think that that single law is more important than all the rest of the Regulations put together, and it determines very largely the course of my own argument.

Judicial notice is a technical phrase which, in effect, means the Court is supposed to know as a matter of its own military knowledge what the Laws and Usages of War are. Every officer is supposed to know them - and I emphasise that because I think it necessary to reassure this Court that when I say I am going to talk about International Law the impression is apt to be taken that I am going to lead the Court into some kind of mysterious legal jungle where only the specialist or expert can find his way about. Actually it is going to be very different indeed. My argument is going to be as free as possible from anything in the way of technicalities. I hope I shall use no argument which is not equally intelligible to every officer here, whether he happens to be a lawyer or does not.

The importance of this phrase of the regulations which I have quoted is this, that it appeals directly to the military knowledge of every member of the Court individually. It says to him: you as an officer are supposed to know what the laws and usages of war are; you as a soldier and an officer are supposed to know what is meant by a violation of those orders. You do not need a lawyer to tell you what is meant.

Therefore I, without in any way belittling the importance of the functions of the learned judge advocate, wish to impress upon the Court at this early stage that it is a responsibility of every individual member of the Court as an officer to exercise his personal and individual judgment upon the arguments which will be put before him.

I have myself sometimes been a judge-advocate and I certainly would be the last to belittle the importance of the office but I am not in any sense belittling it but, at the same time, I ask the Court to share the responsibility of the learned judge-advocate when they are asking themselves: what is a war crime; is this a war crime or not?

May I say also, since I am appealing in this very individual way to every member of the Court, that I will welcome from every member of the Court and from the learned judge-advocate as many interruptions as they wish to make on any point. I know very well that I cannot always make myself clear, and if there is any point upon which I do not make myself clear, I hope that you and your colleagues will interrupt me as often and as long as you like.

I now propose to deal with Chapter XIV of the Manual of Military Law. Having said that the Court administers International Law the next point I wish to emphasise and emphasise as strongly as I possibly can -- because I foresee possibly something in the nature of a flank attack from the other side -- is that the law which you will administer is the law at the time of the offence. That, of course, is an obvious and almost universally recognised principle of all criminal law. I wish I could say it was universally recognised, but I cannot because it has been deliberately violated by the Germans. But generally speaking it is a fundamental principle of all criminal law in civilised countries that you cannot punish a man for a crime which was not definitely a crime under the relevant law at the time the act in question was committed.

No one will disagree with that outside Germany and I would like to draw your attention to the fact that we have emphasised in our conquest of Germany that fundamental principle which the Germans themselves violated. In the first law of the Military Government we have laid this down: "No charge shall be preferred, no sentence imposed or punishment inflicted for an act unless such act is expressly made punishable by the law in force at the time of its commission".

Now, as I say, I am emphasising that because I think it is possible that an argument may be used -- I may be doing my friend an injustice, but it is possible it may be used -- that International Law is progressive and whatever it is in the books the Court may be invited to go ahead and create a new precedent for something which has never been done before.

If that is in the mind of my learned friend I will say it is a most dangerous thing, and what is more relevant in this particular case is that it would embody one of the worst features of the German system which we are trying to destroy. By law on May 10th, 1935, Hitler -- I do not know if you have that before you, but I can give you a reference later on -- was very impatient with the irritating tendency of the German judges to decide cases according to law, and he laid it down that people were to be punished although they committed no offence against the law if what was called sound public opinion, "Volksgesundheit", as it is called in Germany, demanded their punishment. We are in some danger of that here.

Public opinion, sound or unsound, has lashed itself up into a fury over this case and all of us sitting here at this bar have some personal experience of it - not that it is relevant but I can assure you we have been made to feel it.

You see what that German law meant. It meant really the abrogation of the rule of law. Germany in the old days would have been proud to call itself: "Rechtsstaat", but the law of 1935 made an end to it. Under that law anybody could be punished for anything; Hitler did not care whether it was against the law or not. Therefore I feel I cannot over-emphasise, even at the risk of being tedious, the importance of asking the Court to consider only the law as it was clearly enforced at the time of the alleged offence and on ordinary principles of criminal law it will be for my friend, Col. Backhouse, to prove -- the burden is upon him -- that every act charged was a criminal act punishable in the individual concerned at the time it was committed.

May I add by way of one further caution that it is no function of the Court to ask itself whether the law is a good law or not, or whether it is adequate. If you will be good enough to glance at the Manual of Military Law, Chapter XIV, you will find rather an interesting footnote at the foot of page 4.

This is the chapter which has been inserted later into the Manual, and the footnote reads: "The experiences of the Great War subjected the Hague Rules to a severe test. On the whole the Rules did not work badly, and their absence would have been disastrous". Then it goes on to say: "At some future time they will require to be reconsidered at an International Conference and brought more up to date. Further provision is specially required for dealing with the treatment of resident enemy subjects, the means of carrying on war, the bombardment of undefended places, the question of military reprisals, the punishment of war crimes, and the occupation of enemy territory".

Now whether you agree with that or not, it was clearly in the minds of the learned authors of that chapter, Colonel Edmunds and Professor Oppenheim, that they did not think the law was quite good enough, they thought it needed being brought up to date, and as they say quite properly it must be brought up to date by international agreement. You will see, therefore, that the law may possibly be defective in the opinion of the Court; you may think it is a great misfortune that the law as we find it does not contain rules which enable us in this Court to punish these people. However, that is a matter to be decided elsewhere.

May I here draw a contrast with the forthcoming trials at Nuremberg. Nobody pretends that that is a trial under the existing law in 1939. In fact I think I may say that lawyers as a whole are rather doubtful about the whole proceedings, but that is another matter. It is, at any rate, a special case governed by special international agreement of all the Powers concerned. This Court, on the other hand, does not rest upon any international agreement; it is constituted by purely British authority, by His Majesty's Warrant, and its duty is purely to administer the law exactly as it finds it at the time of the alleged offence.

Unless there are any questions which you, Sir, or any member of the Court wish to ask that concludes what I call my picture or background of my argument.

(At 1300 hours the Court is closed.)

(At 1430 hours the Court is re-opened.)

(The accused are again brought before the Court.)

THE PRESIDENT: You had just finished the introduction, Col. Smith, and you are now going to deal with the main argument.

COL. SMITH: That is so. The rest of what I have to say is what I will call my main argument, and for the convenience of the court I will say at this point that it falls under two main heads. First, I will discuss the question of what is and what is not a War Crime. Secondly, I will deal with the question of responsibility.

Throughout my argument, perhaps this is amplifying what I said ~~before lunch~~, I should like to say that I am really speaking continuously, as it were, in two capacities. On the one hand, as counsel addressing a Bench; on the other hand as an officer appealing to the military judgment and experience of other officers. There are various points, one being more important than the other, but the two are interwoven all through.

The first point is: What is and what is not a War Crime? Here I would direct the attention of the court to Chapter 14 of the Manual of Military Law, but perhaps I should begin by saying a word or two about that chapter. It dates from 1914 in its present form, and the authors were the late Colonel Edwards and Professor Oppenheim. For the most part the text is substantially the same as the last edition of Professor Oppenheim's well known work on International Law before his death. Technically it is not an authority in the sense which lawyers understand the word "authority"; that is to say, something which is binding upon us. On the first page it describes itself as being, I think, the best guide at present available on the subject of which it speaks. It is not meant for lawyers but for serving officers as a practical working instruction telling them what they have to do when they come up against a particular point. It is written in non legal language, but at the same time I think for the most part it is perfectly sound in law, and I am going to appeal to it with some confidence.

With that much introduction to this question of War Crimes, I will say this, that in every crime you have to consider three elements: The Act, the Perpetrator, and the Victim. In each case the prosecution has got to prove that the accused is guilty in all three respects. That is to say, the act constitutes the thing which the law punishes, the perpetrator is the person who can commit the act, and the victim is the person against whom it can be committed. In most cases the last two do not matter, but there are some crimes which can be committed by some people only - by doctors, by the Clergy, and by solicitors, and some, as we all know, committed only by soldiers. Whether there are any crimes committed by lawyers I am very doubtful! Similarly, certain crimes can only be committed against certain people, against people under such and such an age and so on.

Those three points, if relevant, have all got to be proved by the prosecution. I am going to begin with the question of the act. What acts constitute War Crimes? Here I am going to ask the court to consider with the utmost care the relevant passages of the Manual which, as I say, are substantially the same as in Oppenheim's book. They are also substantially the same as in the American Manual.

Paragraph 441 of Chapter 14 of the Manual says this: "The term 'War Crime' is the technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment or capture of the offenders. It is usual to employ this term, but it must be emphasised that it is used in the technical military and legal sense" - notice "military" and "legal" only - "and not in the moral sense".

It goes on to say in paragraph 442: "War Crimes may be divided into four different classes: (i) Violations of the recognised rules of warfare by members of the armed forces. (ii) Illegitimate hostilities" - that does not concern us - "Espionage and war treason" - that does not concern us - and "Marauding" which also does not concern us. The only thing we are concerned

with at the moment is Sub-section 1 of paragraph 442: "Violations of the recognised rules of warfare by members of the armed forces". Paragraph 443 gives a long list of examples. They are not necessarily exhaustive but it is difficult to think of anything else.

My first submission upon this is that when you read "Violations of the recognised rules of warfare by members of the armed forces" and go on to read paragraph 443, which gives a long list of examples, you will see that they have only one thing in common; they have all something to do with war. They are all concerned with military operations, ending up with the treatment of the inhabitants of occupied territory. That is the common feature of them all.

The rules of international law are all ultimately reasonable rather than technical. There is a good reason for them all, and if you turn back a page you will find the reason. The number of the paragraph is 438.

Let me explain the general arrangement of this manual. It corresponds, broadly speaking, to the rules of warfare attached to the Fourth Hague Convention. One has got to remember that it has got to be considered as a whole. If you go through it you will find, following the Hague Convention, that it deals with one subject after another; the question of combatant and non-combatant, the question of legitimate weapons and that sort of thing, the question of legitimate and illegitimate bombardments, prisoners of war, the sick and wounded, and ends up a little before this with the occupation of enemy territory.

That takes you down to paragraph 434. That follows the rules attached to the Hague Convention in the same order, and it is, as it were, a War Office commentary upon the Hague Convention. In other words, the greater part of this chapter is devoted to explaining what you can and cannot do in actual operations. That is the general principle.

Having explained all that at some length I now come on page 81 to the means of securing legitimate warfare. You have been told already what legitimate warfare is and is not, and then you have this section which says the means of securing legitimate warfare.

I will begin by saying that complaints are always made in any war. Paragraph 435 and 436 re-emphasise the principles of state responsibility. It quotes the Third Article of the Convention: "The offending state should be made to pay compensation and is responsible for all acts committed by persons forming part of its armed forces. Then it goes on to say what remedies are available: "As war is the last remedy of Governments for injuries, no means would appear to exist for enforcing reparation for violations of the laws of war. Practically, however, legitimate warfare is, on the whole at least, secured through several means recognised by International Law. Moreover, it is in the interest of a belligerent to prevent his opponent having any justifiable occasion for complaint, because no Power, and especially no Power engaged in a national war, can afford to be wholly regardless of the public opinion of the world. (438) These means fall into two classes according to whether or no they fall under the category of self-help. To the one class belong: complaints lodged with the enemy; complaints lodged with neutral states; and good offices, mediation, and intervention of neutral states. To the other class belong: punishment of war crimes committed by enemy soldiers and other enemy subjects; reprisals; and the taking of hostages".

If you read this as a whole you get it placed in the right perspective. The punishment of war crimes is a means of securing legitimate warfare and nothing else. That is very important and I do wish to impress that upon the court as strongly as I can. The only purpose of making a war crime punishable in the individual is that it is a means of securing legitimate warfare and it is introduced because without this terror hanging over individuals you could not be certain that mere international action

on international level would secure legitimate warfare. That explanation governs everything that follows and I cannot emphasise it too strongly. In the light of that you must read the definition which is described as being technical, military, and legal, which appears on the next page at paragraph 442 and is explained further in the following paragraphs. That is very important, and if any member of the court has any doubt about it I hope he will ask me to clear it up.

At this point I will refer to the introductory speech of my learned friend Colonel Backhouse who, I think, is under a misunderstanding. At page 23 of the transcript you will find my friend quoting paragraph 383 of the manual, which says: "It is the duty of the occupant to see that the lives of inhabitants are respected, that their domestic peace and honour are not disturbed, that their religious convictions are not interfered with", etc. That is a paraphrase of Article 46 of the rules attached to the Fourth Hague Convention. Where I think he has gone wrong is he has failed to see that the words: "It is the duty of the occupant" refer only to the enemy state. Throughout the Hague Convention these words: "The occupant" are always used in the sense of the enemy state. It occurs over and over again in the Convention and is always in that sense. But when it is a question of making a case against individuals that is entirely irrelevant. It is the duty of the occupying power to see that everything is done properly in occupied territory; and if the occupying power fails to provide for that, then, of course, Article 3 of the Convention comes in, which I have already quoted, namely the occupying power must make compensation, as I tried to explain this morning.

The same thing applies to the next paragraph; "That is the Laws and Usages of War in respect of the inhabitants of occupied countries occupied by a belligerent". Here is a curious slip. "Paragraph 442" - says Colonel Backhouse - "of the same chapter reads as follows: 'War Crimes may be divided into four different classes, the first of such classes being violations of the recognised rules of warfare'". If you turn to the manual you will find that Colonel Backhouse has overlooked the second part of that paragraph: "by members of the armed forces". So it is easy, as I say, to misunderstand these sections if you do not bear in mind that the primary purpose of the rules is to secure the responsibility of the enemy government, and that it is only in certain exceptional cases, which are carefully defined in the manual (and I would submit correctly so) that responsibility rests upon the individual.

As I have said when you read these paragraphs together and as a whole you will see that they are all bound together by this common principle that all acts cited are directly connected with the operations of war, and that the purpose of the punishment of war crimes is that it is a means of securing the legitimate conduct of the operations of war.

Bearing that in mind, let us turn to the case or cases before us. Here I am going to be very untechnical and possibly painfully obvious when I say that these have nothing to do with the war at all. This policy of concentration camps was started by Hitler within a few weeks of his ascension to power in early 1933. It was continued with ever increasing intensity throughout the whole time of peace, and it would have been continued after the war if the Germans had won the war. It was part of a national German policy, a policy which we are all agreed is detestable, primarily the degradation and ultimate extermination of the Jewish race. More than that, in addition to the unfortunate Jewish race the Germans regarded as their inferiors the Slavonic races who were treated with scarcely less severity. So I would like to submit to the court, and as strongly as I can, that we are dealing here with incidents which occur, it is true, in time of war, but which have no logical connection with the war whatever - a policy which was begun in peace as a peacetime policy and was intended to be carried on as a permanent and long-term policy until its purpose was achieved, the extermination of these unfortunate races. - It has nothing to do with the operations of war whatever.

The only difference the war made to this long-term policy was to increase the geographical area over which that policy could operate. That is to say, as soon as the Germans overran some territory, East or West, it does not matter, they at once put into effect in that conquered territory their racial policy, and they would have continued to do so with even greater intensity if they had happened to win the war.

Put it in another way. From our own point of view in what way does it assist the security of our forces to punish someone who has been guilty of misbehaviour in a German concentration camp? How do we assist the operations of our armies by punishing people who have done this or that wicked thing, such as at Belsen or a great many other places? >2

A MEMBER OF THE COURT: I should just like to ask a question. >3 I am not clear because in paragraph 442, sub-section 2 of Chapter 14 that covers members who are not members of the armed forces and I cannot see the difference. >3

COL. SMITH: >4 It is covered in this way. If someone who is not a member of the armed forces takes part in hostilities, including the commission of a war crime, he thereby comes under the second sub-paragraph: "Illegitimate hostilities in arms committed by individuals who are not members of the armed forces". Either he is a member of the armed forces or he is a civilian committing illegitimate hostilities, one way or the other. But apart from those examples given in paragraph 442, which are divided under those four heads, there are no war crimes. As I say, the manual is not authoritative in the sense in which lawyers understand that word, but I submit that it has very great weight. If you turn to the American manual, which the Americans call the Basic Field Manual No. 27, Rules of Land Warfare, you will find that it is substantially, though not verbally, the same as our own. The relevant Articles are 345 and following. They follow the lines of the Hague Convention. Article 346 "Remedies of Injured Belligerent" is practically the same as our paragraph 438. Article 347 "Offences by Armed Forces", gives the examples in almost the same words as our Article 442. Then you have: "Hostilities committed by individuals not of Armed Forces". Then people called "War Rebels" that means who rise against the military government. Then you have "War Treason" which really covers a lot of acts done against military governments; "Unauthorised Belligerents", "Armed Prowlers" (the Americans have added that) and then "Marauders" which is the same as our own.

Therefore you see that the American manual is substantially the same as ours, and so far as I have been able to carry out my own personal enquiries, there is a substantial general agreement among the various military manuals as to what a war crime is. They all have this in common, that it must be a crime connected with the prosecution of the war in some way or another, either when hostilities are still proceeding or by resisting occupation in a territory which is under military government. Although I have made the fullest search available to me since the last time I was here, I can say with certainty I have been unable to find any example of a war crime which does not come under one of those heads. The burden of proof is not on me but on my learned friend, Colonel Backhouse, and I challenge him with some confidence to produce any example in history of a war crime which cannot be brought within the principles I have tried to explain to the court. >4

A MEMBER OF THE COURT: Could you explain the effect of Note 6 on page 82?

COL. SMITH: >5 "The term 'War Crime' has by usage in 1914/18 been employed more especially in respect of violations of the recognised rules of warfare rather than to the remaining classes of war crimes enumerated. Its more general meaning is, however, well established in International Law". I am not quite clear on your point there. I think what the author had in mind was probably the Leipzig Trials of 1919 in which the best known examples were the submarine sinkings and things of that kind.

I am glad you mentioned that because it bears out what I have been trying to say. As is well known, the British government collected a large number of alleged war criminals of the last war, and by arrangement they were prosecuted not before our courts or before International courts, but before the German Supreme Court. Most of them were acquitted. I think I am right in saying, however, that all those cases which were put forward by the British government after the last war failed within the principle that I have mentioned. They charged the offender with some act such as the sinking of an unarmed ship without warning, which had a direct relation to the operations of war.

The point I have been trying to make is that the acts charged in this charge-sheet have nothing to do with the operations of war at all. They are operations which happened in times of war in pursuance of a policy initiated six years before war broke out, and a policy which was intended to be carried through to the end in peace and in war until it had achieved its object. I think that is what was probably in the author's mind.

I referred ~~this morning~~ to the important fact of the court being instructed to take judicial notice of the Laws and Usages of War. I think I will suggest to you now that what I have just been trying to explain is what every soldier would regard as a war crime. None of us until these cases were raised would ever have dreamed of saying within our military experience we should treat as a war crime something remote from the theatre of war committed in pursuance of a policy originating in peace, and having no relation whatever to any military operation on the face of the earth.

For the moment I will assume the role of an officer talking to officers, and I would ask you: would not any officer if he was asked before all this business began what a war crime was have answered in the sense I have just been trying to explain? I think he would. I am sure my learned friend will have a difficult task in trying to convince the court to the contrary.

I have said enough about the question of the act, and I am now going on to speak about the perpetrator and the victim. Concerning the perpetrator I need not say very much. Looking back at paragraph 442, which is substantially identical with the American manual, you will find that the first sub-section is: "Violations of the recognised rules of warfare by members of the Armed Forces". Of course, civilians can commit war crimes such as espionage, war treason, and marauding. Also a civilian can be guilty of the murder of a prisoner of war. That is all. But if he does the latter, he is committing an act of hostility and an illegitimate act of hostility for which he can be punished under the second sub-section of paragraph 442, but here none of the acts charged in this charge-sheet, except possibly one, come under that head.

I think perhaps this is a convenient point to refer to the few cases charged where the victims have been prisoners of war. One of them was a British subject who was captured as a prisoner of war and transferred to the concentration camp - a clear International wrong. What did the wrong consist in? The wrong consisted in ceasing to treat him as a prisoner of war and taking him out of the camp where he was protected by the Geneva Convention and putting him in that concentration camp, where he was exposed to the same treatment as any other inmate. The responsibility there with those who took the man out and sent him to Auschwitz or Belsen or elsewhere. But the responsibility of the people at Auschwitz and Belsen was the same in regard to that man as any other inmate. I do not know if they even knew he was a prisoner of war. In any case they had no option but to treat him as anyone else. That is why I emphasise now the importance of drawing a clear distinction between the responsibility of the German State and the responsibility of the individual in the particular case. That is a very good example.

Supposing a prisoner was murdered in his prisoner of war camp by a soldier or a civilian, you would have a clear case of a war crime. If you take him away from a prisoner of war camp and put him in an internment camp the German Government is responsible for failing to treat him in accordance with the Geneva Convention. When he is in an internment camp he is just the same as any other internee and the responsibility is the same.

The violation, as I say, may be either by members of the armed forces or by civilians, but by civilians only in certain limited cases which I think are sufficiently set out in the manual, and in all cases the same thing applies as before; whether they are committed by soldiers or civilians they must have direct connection with the operations of war.

Turning to the victim, here I am afraid I shall have to ask the patience of the court in an argument which is more technical than anything I propose to inflict upon you. They must be allied nationals. I think we are agreed upon that and the charge says so - again for a very good reason. It is no part of our business to punish crimes committed by one German against another, nor is it our business to punish Germans for crimes committed against their allies. I say that for this reason. I notice references to Hungarians and Italians who are certainly not allied nationals, even though some of them have come over to our side. The words "Allied Nationals" has a definite meaning and relates only to those who are nationals in the list of countries known as the "United Nations". There is a definite list which does not include Hungary or Italy even if the present Italian government is co-operating. I do not think the prosecutor is likely to press that matter so I will not say much more about it.

On the question of the Poles who are, I think, in the large majority together with some Czechoslovakians and possibly Austrians, I have got rather a more difficult task for which I shall have to ask the patience of the court. Article 442 includes among war crimes the ill treatment of the inhabitants of occupied territory. What do we mean by "Occupied Territory"? Our Government regards Poland and the greater part of Czechoslovakia as territory occupied by the Germans in the sense of the Hague Convention. But, on the other hand, putting ourselves in the position of the accused, who are Germans, there arises the question: what is the accused to do? Does he obey the law of his own country or does he act upon the International position? Here comes a very important point which will come in a good deal in what I have to say during several stages of this argument.

I am submitting to the court with confidence this proposition. Wherever there is a conflict between International Law and the law of a particular country it is the duty of the citizen of that country to obey his National Law. For that I have got quite overwhelming legal authority, and here perhaps I should address myself rather especially to the learned Judge Advocate, because it seems to me quite overwhelming. I have gone into as many countries as I have had time to look at and they are all the same. I will refer the learned Judge Advocate to two cases only, because I know we have not got any reference libraries here, and although I could overload this heavily with authority I will spare the court needless references.

The first case I would mention is that of Mortensen v. Peters in 1906 in the High Court of Justiciary, which is the Supreme Court in Scotland, reported in 8 Sessions Cases, 93: 43 Scottish Law Reports 872. In that case the question was quite distinctly raised and it arose in this way. The British Parliament passed an Act prohibiting certain forms of fishing in various waters which included the whole of the Moray Firth in Scotland. They prohibited it in comprehensive terms. Now the waters of the Moray Firth include a great deal more than the recognised limits of territorial waters. The offender was a Norwegian trawler which was fishing outside territorial waters but within the area covered by the Statute. He was convicted in a Scottish Court and was carried on appeal to the High Court of Justiciary in Scotland (which is the same as the Court of Appeal in

England) and the court unanimously held that they were not concerned as to whether the Statute violated International Law or not, and we have to admit that it did. The Law of the land, however, expressed in an Act of Parliament, was binding on the court and they had to uphold the conviction. You will find it very fully expressed in the judgment and it could not very well be otherwise. The court is bound by Parliament as representing His Majesty's Government and every administrator, police, official or ordinary citizen is bound by the law of the land, and if Parliament inadvertently oversteps the limits of International Law that is a matter not for the individual citizen, or the Judge, or policeman; it is a matter of discussion on high level between the two governments concerned. Actually that is what happened when it was drawn to the attention of the Government. They discontinued those prosecutions against foreign fishermen and squared it up with the Norwegians, and introduced an amending act which said the prosecutions in those cases would only be directed against British vessels.

I could spend the whole afternoon piling up authorities to this effect, but in order to show that this is not a purely British view I will quote an American case, again from high authority, because it comes from the Supreme Court of the United States. The case is that of Fong Yaro Ting v. United States in 93, 149 United States Reports 698. Congress there did exactly, or rather more violently, what our Parliament did. They passed legislation in direct violation of a Treaty with China. It was one of these acts for the exclusion of Chinese and putting various restrictions upon them which was, in fact, contradictory to a Treaty between the United States and China. I will just quote from the footnote which sums up the decision in this way: "The provisions of an Act of Congress passed in the exercise of its constitutional authority must, if clear and explicit, be upheld by the courts, even in contravention of stipulations in an earlier Treaty".

Of the other researches which I have undertaken I will merely say this, that the attitude of the German court is exactly the same. I will not go into further detail because this is highly technical. As far as I have been able to find out, that is the common principle of the courts of all countries, where there is a conflict between International Law and Municipal Law the citizen is bound to obey his Municipal Law as a matter of individual duty. That does not diminish the responsibility of the State towards the offending State for its failure to make its internal law correspond with its international obligations. I think that is not only technically correct but it is fundamentally reasonable.

The average Englishman can be expected to know the law of his own country, and if we are faced with a case where our Parliament has passed a Statute which is said to contravene International Law, anyone of us, officers or civilians, would say something like this: "Well I do not know about this International Law. I know there the law because the policeman tells me it is the law and I have to do it". That is the common sense attitude of the ordinary man and I think it is the only feasible attitude. What I have said there is going to govern a good deal of what I have to say during this argument.

In the first instance I am going to apply it to this question of occupied territories. Naturally Great Britain did not recognise the annexation of Poland or of the greater part of Czechoslovakia, but by German law, which Kramer and all the other defendants consider, Poland was German territory - perhaps I would be more precise if I said about half was German territory and the rest was Russian - but at any rate, the Western half of Poland was formally annexed to Germany. I take it that Colonel Buckhouse does not want me to pile up the authorities. >⁵ ~~EE~~

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COL. BACKHOUSE: I certainly do not agree that the Western half was annexed by Germany or anything like that, not even by German law. A small portion I would agree. >6

COL. SMITH: 7/ The court will remember when Germany invaded Poland in 1939 the country was overrun and resistance ceased, I think, after about three weeks. During that time the Russians invaded from the East. They reached an agreement with the Germans, the effect of which was substantially that Poland was divided up approximately on the Curzon Line, and the Western half became German in two classes and the Eastern half became Russian. That is the position as far as the Eastern half is to-day. Great Britain did not recognise either one or the other. The actual text is that the Western parts of Poland were incorporated as part of the German Reich, which covers Western Prussia. >7 -

COL. BACKHOUSE: Can you give me the date of that?

COL. SMITH: 8th October 1939; it covers Western Prussia and Posen and then there were various sub-divisions. >8

COL. BACKHOUSE: If it will help to explain things I agree that a portion of Poland was claimed to have been annexed but it was divided into two parts, one half being administered by a Government General.

COL. SMITH: I agree with Colonel Backhouse that it was divided into two parts of which the Western was formally annexed and became part of Germany. The Eastern Part was called a General Government. The distinction between them was purely technical, except for this, that the Western half was treated as German for all purposes; the Eastern part was no less German, it was not a temporary military occupation, it was a permanent arrangement by which Eastern Poland was put under a Government General which had, of course, dictatorial powers.

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My point is this, that neither of them were intended to be temporary occupations. The annexation of the Western part and the area called the General Government in the Eastern part were both equally permanent, and the Polish State, from the German point of view, ceased to exist, and the German law with minor variations was equally applied to both.

I do not think we need bother very much with the internal differences, but every German in those parts (and Auschwitz is in the annexed part) was bound, too, by German law. It was no longer temporarily under military occupation in the sense of the Hague Convention. German law was applied by German authority, and the Polish State and Polish nation had ceased to exist. That was the position as Kramer or anyone else found it when he was in Poland.

As I say, the individual is bound by the law of his country. We may say that the occupation was premature. It may have been and, of course, the course of the war has undone it. Let me give you a more precise parallel to that - the South African War. That began in October 1899 and lasted until June 1902. In May 1900, about eight months after the beginning of the war, the British Government rather prematurely published a proclamation annexing permanently the Transvaal and the Orange Free State. It may have been premature, I think it was, but that does not matter. My point is this: would any officer of this court, if he had been an officer serving in South Africa at that time, have ventured to say to his superior: "I am afraid the Government has been premature in annexing these countries, and I am afraid I cannot obey your orders".

It would be a perfectly impossible position. Any one of us, if we had been officers in South Africa or ordinary citizens, would have had to obey the articles of the proclamation and leave it to the high ups, if it was doubtful, to fight it out in the normal way on the international level.

Of course, every crime must be considered to a certain extent from the point of view of the criminal. If it something which he cannot be expected to know or understand, that is a material element. For instance, if the person is of a certain age or class, such as a policeman, it is, I believe, more serious in law to assault a policeman than to assault anybody else. If, however, you did not know that, you could not be convicted of assaulting him as a policeman. If it consists in committing a crime against the occupant of an occupied territory - and the accused person is bound by the law of his country to treat it as part of Germany - the material part of the guilt is simply not present. I hope I have made that point clear.

What it comes to is this. So far as all these accused were concerned, Auschwitz was Germany, and the people in it were German subjects. They were not German citizens because the citizenship in Germany belongs to a privileged class now by virtue of the Nuremberg law of 1935, which restricts German citizenship to pure Germans. It restricts Jews and Poles and various other people, but all these people were German subjects; that is to say, subject to the full force of German law, and owing allegiance to Germany although they were not German citizens in the sense that they had the privileges of German citizens under the German Citizenship Law of 1935.

What I have said applies also to Czechoslovakia, except that it is a little more complicated there. This dismemberment of Czechoslovakia was piecemeal, and the first act of dismemberment (I am afraid we were committed because it was carried out with our active assistance) was the annexation of Sudetenland, for which we must all share the blame. Six months after we had agreed to that Hitler invaded the rest of Czechoslovakia, and what happened was that part of it was transferred into the Protectorate of Bohemia; part of it was given to Hungary and a little bit of the eastern end was given to Russia. However, I need not go into all these details because the substance of the matter is the same as in the case of Poland, namely that from the point of view of any German all that territory, except the bits given to Hungary or Russia was German territory either by direct annexation or by a Protectorate, which is only a mere technical difference.

Therefore at this point a war crime can be regarded, firstly, from the point of view of the act, secondly, from the point of view of the perpetrator, and, thirdly, it can only be collectively committed against a certain victim, and it is for the prosecution to prove that he was an allied national and an allied national under the law by which the accused was bound.

This very nearly concludes my first argument under the general heading of what is or what is not a war crime, or what is in more technical language a violation of the Laws and Usages of War. At this point I am going to anticipate a possible argument which may or may not be brought forward. If Col. Backhouse disclaims this argument I will apologise to him for putting it into his hood. In any case it is a possibility, and since I will not have an opportunity of speaking again I must anticipate it. I foresee the prosecutor, rightly or wrongly, saying that by the books or by the authorities this is not a war crime, but he may say that we have got to bring our law up to date. International Law is not static; it is continually developing. It has to adapt itself to meet new situations as they arise. Therefore he will ask the court to say that something which is not a war crime according to all the books and according to all the precedents of history is going to be a war crime from the time the court gives its decision. If that is in the mind of my learned friend I am going to try and meet it.

Obviously it is in the nature of a flanking attack after the frontal attack has failed. It is dangerous to me for this reason. International Law does develop. It is not static. If it were static it would be dead. I have in suitable cases strongly followed that doctrine myself, but what I will try and submit to the court now is that the development is always the application of accepted principles to new situations and never a reversal of accepted principles themselves. May I illustrate that.

I will take as an example a case in which I had personal concern. That was a case of contraband in the early stages of the war. There is a very long history behind this question of contraband stretching back to the Middle Ages, and there have been innumerable controversies as to what articles could and could not be included in the list of contraband of war. Well, at the beginning of this war we made a kind of proclamation and treated almost everything as contraband. Certain neutrals objected to that and they pointed out, quite rightly, that we had never gone as far as this before, and they quoted all kinds of precedents to show that we were going very much further than anybody else had gone before, and it was perfectly true. The answer to it all was also perfectly sound. The principle of contraband is that you are entitled to stop and capture any cargoes which are going to help your enemy in carrying on the war. It meant the control over every form of commerce, but the technical and physical requirements of our armed forces have practically brought every article of commerce within the principle of contraband. That was the answer which His Majesty's Government put forward to those neutrals who raised that point. I had something to do with it and I thought then, and think still, that it was a perfectly sound answer. At any rate, it worked, because it was a case of taking the principle of contraband and applying it to the modern development.

I could, if time permitted, but I will not fatigue the court, cite many other examples very largely on warfare in which one has to take account of modern developments, both in the character of the modern state and in the new system of modern commerce and technical implements of warfare. They have their effect not upon the principles of International Law, but upon its application to the particular problems of to-day. Does that apply here? Can you say that some circumstance has arisen which compels us to treat as a war crime something which has nothing whatever to do with the war?

We are not faced with a new problem here. The concentration camp started in Germany in 1933, and in Italy much earlier, and, broadly speaking, the ill-treatment of subject Races has been only too common in history in one form or another. The facts, unfortunately, are not new except in their intensity and atrocity, but if you say that modern International Law ought to punish maladministration in concentration camps in a country we happen to conquer, then, of course, you are coming up against the fundamental principle which I mentioned this morning, namely, that you must not, at any cost, make your law after the event in criminal law. ~~✓~~

I mentioned the German Treaty which violated that principle. It has been held up as a violation not only of war but of conduct, and I would suggest to the court that the argument which might be based upon this perfectly sound document is a deadly and perilous thing if it is applied in a case like this, because it would, in effect, lead us into acknowledging one of the most terrible things that our enemy has done. On the other hand, of course, it would be flatly contrary to the principles we have laid down in our military government law for the conduct of Germany. ~~✓~~ >9

10 < I now come to the second main heading of my argument, and the first question we have to ask ourselves is: Can these individuals be individually punished for the various things they are accused of doing? Let me say again what I have said before. In International Law the general principle is that the State and not the individual is responsible. As an example I mentioned

the case when one of our ships makes a capture which is subsequently proved to be illegal and is condemned as such by the Prize Court. That does not mean that the captain of the vessel is punished. It means that we have to pay compensation for the ship and its cargo. If, to take another example, a British subject is maltreated in Mexico, as has happened in the past, then the Mexican Government has to pay compensation to the British Government. Any question of punishment is for the Mexican Government to settle as an internal affair. That principle is well established and for obvious reasons.

To that principle there are a few exceptions of which one is the pirate. International Law has always permitted a pirate to be punished by anybody who can catch him because he is an enemy of the human race. He is punished because he would not be a pirate if any Government was responsible for his actions.

There are other exceptions created by a large number of treaties with deal with such things as the opium trade, and white slave traffic, which are punishable.

Another exception is that of the war criminal. There again there is a reason for the exception, the reason being that for which we have already seen in Article 438, where if you had not got the right of punishing war criminals on the spot you could not carry on your operations of war and security. None of those reasons apply to the case now before you. We are only dealing with these cases after the war is over. Nothing that has happened in concentration camps has affected our operations in the slightest degree while the war was still in progress.

I want to refer to the argument with which I have dealt in some length in connection with occupied territories. I am coming a little later to the so-called defence of superior orders, but before I come to that I want to make it clear that the problem here in most cases is not that of superior orders as it appears in the manual or in the other textbooks. The cases there put before you are all cases where the soldier, or some other subordinate, is faced with the difficult alternative of obeying his commander who is obviously giving an illegal order on the one hand, or punishment by his superior or by a court of law on the other. That is the problem.

What I am going to suggest to the court now is that all these orders were legal, so far as it is a matter of orders at all. Here I am afraid I must invite the court to consider rather carefully the extraordinary structure of Germany. We have in Germany a most extraordinary situation in which there was not and could not normally be any conflict between an executive order or legal ruling and an illegal one in the sense that a law does not permit it. In the very first stages of Hitler's regime the Reichstag abandoned all its powers and Hitler became the Executive and Legislator in one. Not only did Hitler himself combine all these powers, but he also delegated them to certain members who were directly responsible to him. Each member had the force of law within his limits, and the most important one of these members was Himmler with whom we shall be especially concerned this afternoon.

Himmler held high office in the SS before it became a legal organisation at all, and after the revolution his rise became very rapid indeed. In March 1933 he became Chief of the Political Department and the Gestapo was set up in April, Himmler becoming its chief. In April 1934 he was made chief of the Gestapo for the whole of the Reich, which combined practically all those forces. In June 1936 he was made chief of the whole of the German police.

COL. BACKHOUSE: I do not think we have any evidence of all this.

COL. SMITH: I am only quoting from a book I have got which was issued to Military Government by His Majesty's Government. > //

COL. BACKHOUSE: I do not know where we are getting to with all this.

COL. SMITH: It would have been better if I could have put it in formally as evidence. I went over on Monday and borrowed a copy from Brigadier Scott-Barrett at Bad Oeynhausen, and it is the only copy I could lay my hands on.

12/ What it comes to is this. In due course by various stages Himmler became first of all head of the police, including the Gestapo and SS, and in 1943 he became Minister of the Interior. My point is under the German arrangement he could issue an order which as such had the force of law. That was reinforced from the other point of view by a very important law of, I think, June 28th 1935. I am not sure if that has been put in or not. That put the Gestapo and, in fact, all police activities beyond the reach of the law insofar as they were of a political nature. The practical result of that was no police action (and the word "police" covers an immense lot in German) could be challenged in any court; neither could it be questioned by anybody except at the peril of his life. Apply that to the most important thing in the charges, the gas chamber at Auschwitz. If you ask me to produce a law legalising the gas chambers at Auschwitz and Belsen of course I could not do it. All that was needed was an order from Himmler saying "Have a gas chamber." That order was a law which every German had to obey in so far as it concerned him. > 12

13/ COL. BACKHOUSE: I do not want to interrupt my friend, but I do not think this law is in. German laws were put in by one of my friends and those law can, of course, be referred to, and one is in a position to base an argument on them. If, however, German laws are to be produced out of the bag, as it were, without the law being quoted but merely Col. Smith's meaning of the law given it is going to make it very difficult indeed. It does not appear, so far as I can see, to be one of the laws which was handed in at all. If Col. Smith will undertake to give me a copy of the law afterwards I will take no objection to it being quoted without being proved. But if he is merely going to give his views on certain laws without putting them in I think it will make things very difficult. > 13

CAPT. PHILLIPS: You will remember that I put in certain documents by agreement with Col. Backhouse. It is not, I think, in that translation, but it is I believed contained in the red book, the Deutsche Reichsgesetz, which, you will remember, the court said they did not require to have proved by an expert witness.

COL. SMITH: The actual date of the law is February 10th 1936 and is referred to on page 97.

COL. BACKHOUSE: You gave the date 28th June 1935.

COL. SMITH: Yes, what I have got here is the 10th February 1936, and that is correct.

COL. BACKHOUSE: Frankly my position is this. Certain books are a trouble to get, and now additional laws are being brought up and I am being placed in considerable difficulty unless I know which one he is referring to. At the moment I do not know whether he is referring to June 1935 or February 1936.

THE JUDGE ADVOCATE: Would Col. Smith tell us what law he is talking about?

COL. SMITH: The substance of is that no action undertaken by the Gestapo or
14 by any police, insofar as it has a political character, is subject to any
control of the courts.

COL. BACKHOUSE: I am not contesting that that was enacted by some law at some
time - at any rate, for the moment. That is rather a different proposition
to the one which Col. Smith was putting. That is why I should like to have
the law in front of me.

COL. SMITH: If the prosecutor will agree with me as far as that is concerned
I will proceed to deal with what I put forward as my own inference and not
quite from the text books.

I have now the text of it in English. I will, in order not to
embarrass the prosecutor, put what I have to say next in the form of my own
inferences. It is not disputed that the Gestapo and, in fact, all police
activities, were exempt from control of the courts. No complaint could be
put before any court in relation to what they did. It will also not be
disputed, I think, that under the German constitution there was a delegation
of legislative power to each of these chief commissioners within the zone of
his activities. From that - and this is my own inference - I will say that
everyone was bound at his own peril to obey as law any order given by the
competent authority within his department. Applying that to the particular
case of the gas chamber and other atrocities what it means is this: If
Himmler said a gas chamber was to be created he did not need to pass a
special law for it. His order was sufficient, and everyone concerned had
to obey it. That is my proposition and I believe it to be a perfectly
sound one. What it leads to is this. In the case of the average German
it was impossible to have the kind of conflict which might arise in England,
where a man might question the order of his superior officer and say: "You
cannot give me that order under the Army Act", and so on. An order as an
order is perfectly legal, and as I have already explained when dealing with
occupied countries, where there is a conflict between the internal law and
the international law the individual must always obey his internal law.

I will just bring in some specific references to the concentration
camps in general. I am quoting now from this Basic Handbook, and if the
court wish to see it I will place it at their disposal. It contains on page
152 a short section dealing with concentration camps. It explains their
system of administration and, as far as I can see, it comes to this: that the
Gestapo are responsible for arresting people and sending them to the camps,
and the S.S. are responsible for the guarding and the internal administration
of the camps. That is the general picture I derive from this section and
others in the book. There is one paragraph I am going to read rather more
particularly, because it has a direct bearing on Kramer's case -> 14

COL. BACKHOUSE: I do not want to keep objecting, but I do not see how this Basic
Handbook can possibly come before the court as part of a legal argument put
forward now. I know the history of the Basic Handbook and it is not evidence
before this court.

COL. SMITH: I am not putting it in as evidence.

15/ COL. BACKHOUSE: If my friend is talking about legal matters then I have no
objection, but we are now getting on to facts. I know all about the Basic
Handbook, and I submit it is quite wrong to put it forward as evidence of
what happened in concentration camps. I have no objection to legal matters,
but the Basic Handbook is not a legal book at all. It consists of a series
of facts as the Military Government knew them before we ever came into
Germany at all. As a matter of fact, there are a number of later editions
of certain parts of it which were put out separately, but this was written
before we ever came into Germany. Really I do not think this can be taken
as the facts of concentration camps, otherwise we have been completely
wasting our time.

COL. SMITH: I am in the hands of the court with regard to that matter.

THE JUDGE ADVOCATE: I understood that Col. Smith was trying to convince the court that no war crime had been committed in these cases. How far he is allowed to quote that as supporting his argument is a matter for the court. I suppose if he said: "I understand that concentration camps were run in the following way" the court would assume that that was his own view of it and no more.

COL. BACKHOUSE: I have always understood when I argue law before a court that I must take my facts as proved, and I must not start quoting facts that have not been proved. I can use anything for a legal argument, but I must not start quoting facts that cannot be brought out in evidence at all. I am only taking exception now to the way we are going on to what are alleged to be facts, as to how concentration camps are run, I thought we had been proving for about the last eight weeks, and I thought we had quite enough evidence before this court as to the way they were run. I think it is wrong for my friend in presenting a legal argument to refer to facts contained in a book which is not before the court, and which has no legal force whatever. He must confine his statements to the facts which have been proved before the court. The inferences he likes to draw from them and the law applying to them are his own matter, but surely he must not refer to facts which are contained in a handbook which is not before the court.

Kramer and various other people have told us our concentration camps were run, and my friend must accept that or produce different evidence. The views of our own Military Government on the way concentration camps were run before we overran Germany do not appear to me to be proper matters on which to base an argument. It must be based on the evidence proved in the case.

COL. SMITH: Perhaps I ~~may~~ just point out that under Article 8 of the Regulations the Court has a practically unlimited discretion in the matter of evidence and the Court may receive evidence of the facts therein stated any diary or letter or other document appearing to contain information relating to the charge.

THE JUDGE ADVOCATE: But, Col. Smith, you are really in the position of giving evidence, are you?

COL. SMITH: No.

THE JUDGE ADVOCATE: You are really a defending officer addressing the Court on the law upon the facts which are before the Court.

COL. SMITH: Yes, I agree entirely; I am speaking from the bar and not from the witness box.

THE JUDGE ADVOCATE: The Court feel you ought only to refer to facts which have been before the Court but you can elaborate any questions of law. I think that document hardly comes within evidence of facts concerning concentration camps.

COL. SMITH: I have put my argument. It really does not make much difference to me. I shall use it to refresh my memory rather than state it as an authority.

If you look at Kramer's evidence in this case in the transcript, you will find that he lays emphasis upon the fact that all the decisions on matters of policy, including the gas chamber for instance, came from above; that he was a mere administrator who carried on the routine work of the camp and that such a question as to who ~~was~~ to be put into the camp or taken out of the camp, for death or for any other purpose, lay outside his power.

That is Kramer's own evidence and it is not, I believe, contradicted anywhere in the evidence so far as I have read it. I would submit to you upon the facts -- as my friend asks me to do -- that that is a correct inference to be drawn from the evidence put before the Court, and the fact that it is corroborated by the document which I was reading does not in any sense diminish the value of that as upon the facts shown.

I will submit that upon the evidence which has been put before the Court that the commandant of the camp held a very humble rank indeed, equivalent of a captain, and, a fortiori, all the people under him were nothing more than the humblest kind of administrators. At Auschwitz, as you know, Kremer was merely the head of one section in this vast camp and all the big decisions were taken outside him and over his head and he could do nothing about it. All I would say upon the book is that it seems to be borne out but as it appears to be no more than a reference book I will not put it forward as an authority if Col. Backhouse does not like it. > ~~15~~ 15

16 Now I am coming to my last point, this so-called defence of superior orders. I say: "so-called" because I think it is rather a misleading description of that defence.

I am now going to ask the Court to look at the Manual of Military Law paragraph 443 which has been amended very recently in a rather significant way. Paragraph 443 begins by saying: "The more important violations are the following" -- then it runs along for a dozen lines or more and then in the original edition which is before me it goes on to say: "It is important, however, to note that members of the Armed Forces who commit such violations of the recognised rules of warfare as are ordered by their government or by their commander, are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to the other means of obtaining redress".

That was how it stood until last year, and I think in April it was altered. The effect of the alteration is not to destroy but greatly to water down the so-called defence of superior orders. I am going to submit to the Court that the original text was right, that the amendment is wrong, and as I have already explained the Court is its own judge of law and is not bound to take it from the War Office, Privy Council, or anybody else.

The original text which I read a moment ago is in precise agreement with the American Manual. In paragraph 347 of the American Manual it is said: "Individuals of the armed forces will not be punished for those offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall".

So until April of last year our Manual was in exact agreement with the American Manual and, I may add, with many others too. I will submit that that was correct and it was in accordance, I think, with our ordinary experience of the necessities of military discipline. The first effect of the alteration is to throw us out of step with the Americans and with the rules of other armies as well and I submit it is most unfortunate that the amendment was made, I think, in April, 1944, at a time when war crime trials were in active preparation.

Where is the authority for the amendment? The original text was that of Edmunds and Oppenheim in 1914. Now Professor Oppenheim died in 1919 and his book went through various editions under various editors and the latest text which has been incorporated into the Manual is taken practically verbatim from the latest edition of the 2nd Volume of Oppenheim. Now it is always a dangerous thing, I think, to clip a little bit out of a book without reference to its general context in the whole book.

I do not expect the Court to read the whole of Professor Oppenheim's two volumes or his other writings but I think I may say this. In the book as a whole he maintains very strongly the doctrine of the Viennese school, in which he was brought up, that International Law has an inherent superiority to municipal law and where the two are in conflict municipal law must be right. If you were to read Dr. Lauterpacht at length - as I have done, I am afraid - you will find that Dr. Lauterpacht was a very able man indeed does maintain that doctrine which is commonly known as the doctrine of the Viennese school in which Dr. Lauterpacht as a young man was brought up.

Somebody in the War Office or elsewhere, I think, who found himself severely blocked in preparing war criminal trials -- I am merely guessing now -- by this paragraph of the Manual discovered in the latest edition of Oppenheim something which suited him much better so he cut it out and put it in in order to make the path easier. As I say, that is to a certain extent guesswork but it is at least a reasonable guess in view of the latest amendment.

Surely it will be most unfortunate if we condemn people in cases where the defence of superior orders is pleaded by virtue of an amendment to our own Manual, the text of which carries no authority outside this country, a text at variance with the Americans and others, and a change introduced in April, 1944, and brought up now in a case in which the charge sheet begins in October, 1942. If so you have there a very bad example, you are convicting a man on a 1944 text for offences which relate to 1942 or 1943, and a text which is admittedly in conflict both with our own reasoned view, extending back for a very long time, and with the views of other nations.

I submit it is quite impossible for the Court to accept that revised sentence -- it is just one sentence, I think -- as an accurate statement of the law, and I submit that the law was correctly stated as Edmunds and Oppenheim stated it in the old edition, which has served for many years.

So much for that particular text. It would afford the most legitimate criticism of any decision in which the defence of superior orders was brought up if that text was relied upon in the circumstances which I pointed out.

THE JUDGE ADVOCATE: Do you see the foot-note? Do you quarrel with it?

COL. SMITH: I do not think the footnote alters it, does it? As a matter of fact I have not my text before me at the moment.

THE JUDGE ADVOCATE: What it says is this. It refers to the 6th Edition of Oppenheim, which you have referred to, and then it says: "The statement which appeared prior to this amendment" -- that is the one which is crossed out -- "was based on the 5th Edition of Oppenheim's International Law, Volume II at page 454". Then it goes on -- I do not know whether you agree or disagree with it -- "which was, however, inconsistent with the view of most writers upon the subject, and also with the decision of the German Supreme Court in the case of the Llandeover Castle", and then it gives a reference. I do not know whether you quarrel with that?

COL. SMITH: Thank you for bringing it to my attention. I think I must deal with it.

THE JUDGE ADVOCATE: The thing I want to point out is that it makes a statement that most authorities agree.

COL. SMITH: I was only referring to official manuals and not to independent writers.

THE JUDGE ADVOCATE: I have drawn your attention to it and if you wish to address the Court will you do so?

COL. SMITH: The official manuals are generally written either by or with the consent of military men, whereas the independent writers say what they like. Our official manual, of course, is passed by the War Office and the German one also.

COL. DACHHOUSE: My friend is referring to the German one, and I hope he is not intending to leave you with the impression that the German one disagrees with the manual, because the German one is entirely consistent with our manual.

COL. SMITH: I have a recent article by Lauterpacht on international law and what he says is: "The German code of military law has long provided that the subordinate is liable to be punished as an accomplice if when obeying an order he knows that the order involves a crime or misdemeanour". If he knows that involves crime, but that I do not think is very substantially different from ours.

Lauterpacht goes on to say: "According to the law of other states, the immunity of the soldier obeying orders ceases if he knows or ought to have known of the unlawful nature of the order".

I have got to quote all those in the light of what I said a few minutes ago. In the normal case that conflict would not arise because the order he was bound to obey was itself lawful under German Law.

16

17< That, I think, is the real issue involved apart from the fate of the individuals in this particular case. Upholding the authority of the law, whether it suits us or not at the present moment, whether it pleases the public or not or anybody else, to uphold the dignity of the law as the law and to say firmly that nobody who comes before a British Court can be convicted unless the prosecution proves beyond all manner of doubt that he is guilty under the law which governed the act at the time it took place.

That is the essence of my whole case and every detail is really hung upon that. I can sum up my whole argument upon that. If I can persuade the Court to agree with me upon that fundamental principle I verily believe that this decision will go down in history as one of those great decisions which from time to time have adorned our legal history, a decision in which great judges have stood fast against all kinds of pressure from the Crown, from politicians, from popular clamour, and decided strictly in accordance with the law. >17

18< A MEMBER OF THE COURT: In your view did the Jews of Poland become full German Nationals after the German occupation of Poland?

COL. SMITH: Yes, they became German Nationals but not German citizens. The German statutes in this red book draw a clear distinction between the two and anybody who is in German territory is attested to German nationality but there is a higher state, there is the German Burger and the Burger citizen has privileges which a Jew or a Pole has not. He has got to be an Aryan German. I think that is made completely clear by the two acts of German nationality and German citizenship which are here.

The Germans have maintained in substance the old German nationality law of pre-Hitler days but they have superimposed upon the old German nationality law a Nuremberg law of 1935 which creates this new status of German citizenship, Burger, which is a privileged class among German nationals. The book is before the Court and it is all in there.

THE MEMBER: Jews in concentration camps had to wear the star of David all the time, had they not?

COL. SMITH: I believe that is so.

THE MEMBER: Jews were not allowed to hoist the German flag?

COL. SMITH: No, they were not. There is another law called the Flag Law which says that Jews have no right to fly the German flag. There is a whole bundle of those German Burger laws in this red book.

ANOTHER MEMBER OF THE COURT: Not only the Jews in the camps had to wear the star of David but the Jews wandering about the streets had to?

COL. SMITH: Yes.

THE MEMBER: Why should they be considered German nationals if they did not do as other German nationals?

COL. SMITH: The point of being a German national is it makes him subject to all the liabilities of the German but it does not give him the privileges of a citizen. The Jews got the worst of it both ways; they were liable for all the duties that the Germans could impose upon them but they did not get any of the privileges. It was definitely a subject race and that I think is very clearly borne out in those two laws. In one case the old German nationality law is continued. That was quite a reasonable law very much like our own but then they superimposed on top of that the citizenship law of 1935 which created the privileged status of Burger which the Jew could never hope to attain.

So much for that particular text. It would afford the most legitimate criticism of any decision in which the defence of superior orders was brought up if that text was relied upon in the circumstances which I pointed out.

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COL. SMITH: The official manuals are generally written either by or with the consent of military men, whereas the independent writers say what they like. Our official manual, of course, is passed by the War Office and the German one also.

COL. DACKHOUSE: My friend is referring to the German one, and I hope he is not intending to leave you with the impression that the German one disagrees with the manual, because the German one is entirely consistent with our manual.

COL. SMITH: I have a recent article by Lauterpacht on international law and what he says is: "The German code of military law has long provided that the subordinate is liable to be punished as an accomplice if when obeying an order he knows that the order involves a crime or misdemeanour". If he knows that involves crime, but that I do not think is very substantially different from ours.

Lauterpacht goes on to say: "According to the law of other states, the immunity of the soldier obeying orders ceases if he knows or ought to have known of the unlawful nature of the order".

I have got to quote all those in the light of what I said a few minutes ago. In the normal case that conflict would not arise because the order he was bound to obey was itself lawful under German Law.

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17 / That, I think, is the real issue involved apart from the fate of the individuals in this particular case. Upholding the authority of the law, whether it suits us or not at the present moment, whether it pleases the public or not or anybody else, to uphold the dignity of the law as the law and to say firmly that nobody who comes before a British Court can be convicted unless the prosecution proves beyond all manner of doubt that he is guilty under the law which governed the act at the time it took place.

That is the essence of my whole case and every detail is really hung upon that. I can sum up my whole argument upon that. If I can persuade the Court to agree with me upon that fundamental principle I verily believe that this decision will go down in history as one of those great decisions which from time to time have adorned our legal history, a decision in which great judges have stood fast against all kinds of pressure from the Crown, from politicians, from popular clamour, and decided strictly in accordance with the law. >17

18 / 4. MEMBER OF THE COURT: In your view did the Jews of Poland become full German Nationals after the German occupation of Poland?

COL. SMITH: Yes, they became German Nationals but not German citizens. The German statutes in this red book draw a clear distinction between the two and anybody who is in German territory is attested to German nationality but there is a higher state, there is the German Burger and the Burger citizen has privileges which a Jew or a Pole has not. He has got to be an Aryan German. I think that is made completely clear by the two acts of German nationality and German citizenship which are here.

The Germans have maintained in substance the old German nationality law of pre-Hitler days but they have superimposed upon the old German nationality law a Nuremberg law of 1935 which creates this new status of German citizenship, Burger, which is a privileged class among German nationals. The book is before the Court and it is all in there.

THE MEMBER: Jews in concentration camps had to wear the star of David all the time, had they not?

COL. SMITH: I believe that is so.

THE MEMBER: Jews were not allowed to hoist the German flag?

COL. SMITH: No, they were not. There is another law called the Flag Law which says that Jews have no right to fly the German flag. There is a whole bundle of those German Burger laws in this red book.

ANOTHER MEMBER OF THE COURT: Not only the Jews in the camps had to wear the star of David but the Jews wandering about the streets had to?

COL. SMITH: Yes.

THE MEMBER: Why should they be considered German nationals if they did not do as other German nationals?

COL. SMITH: The point of being a German national is it makes him subject to all the liabilities of the German but it does not give him the privileges of a citizen. The Jews got the worst of it both ways; they were liable for all the duties that the Germans could impose upon them but they did not get any of the privileges. It was definitely a subject race and that I think is very clearly borne out in those two laws. In one case the old German nationality law is continued. That was quite a reasonable law very much like our own but then they superimposed on top of that the citizenship law of 1935 which created the privileged status of Burger which the Jew could never hope to attain.

That was, of course, carried out by dozens of other laws, for example the law of marriage or the law for the protection of German blood and honour, the flag law which I mentioned a moment ago, and dozens of other laws which all hit at the Jews one way or another. But they were still German nationals and that made it impossible, of course, for any other State to take a friendly interest in them. It was an ingenious and devilish system.

ANOTHER MEMBER OF THE COURT: If they were German nationals why were their papers marked "Stateless"?

COL. SMITH: I am afraid I am a little out of my depth here. Was it not marked that way in the case of a German who left Germany without the permission of the German Government?

THE MEMBER: It varied, I believe.

COL. SMITH: I think, if I may say so, the word "Stateless" was only put on those passports in cases where the Jew had left Germany without permission, because then he would carry no identity documents and he would be denationalised by German law because there was a law which provided for that. He would be quite literally stateless and somebody or other who issued him with a passport, either in England or in France or in Belgium, would write the word "Stateless" upon it, but if he left Germany without the consent of the German government I am pretty sure he would not carry a passport of that kind.

COL. BACKHOUSE: As a matter of fact that is not so, but I am afraid I cannot give evidence on it any more than Col. Smith. It is put on by the German authorities when they did allow a Jew to leave.

A MEMBER OF THE COURT: I do not quite see your argument about the definition of a war crime. In these days when we launch total warfare between nations everybody is involved in the war -- we have all agreed to that -- and therefore I cannot see your argument about this war crime business.

COL. SMITH: My argument is simply this, that these crimes had nothing to do with the operations of the war and the best proof of that is that they began in peacetime and would have continued after the war was over, but that, if I may say so with respect, is a completely different matter from what I think is in your mind, namely, the distinction between combatant and non-combatant. I quite agree that the circumstances of modern war make it much more difficult to draw the old distinction between combatant and non-combatant in the same way as it was done. That, I think, is a completely different matter from anything we are talking about here in this Court. Would you agree with me?

THE MEMBER: I cannot yet, I am afraid.

COL. SMITH: It seems to me to be an entirely different matter. It is irrelevant to us whether the perpetrators were combatant or non-combatants. The important point I was trying to make is that whatever was done in these camps had nothing to do with the operations of the war because it began long before and would have continued long after, and, in fact, concentration camps are continuing to-day although they are not conducted by the Germans any longer.

ANOTHER MEMBER OF THE COURT: Was not the making of V. weapons another part of the war effort?

COL. SMITH: It certainly was, but probably the tasks on which the unfortunate people were employed had something to do with the war effort because all work is connected with the war effort, but we are not trying them in connection with the tasks on which they were employed but of ill-treatment of them in the camps, which is entirely another matter.

THE PRESIDENT: Major Winwood, do you now make your closing address?

MAJOR WINWOOD: I do not know whether you expect me to finish to-night?

THE PRESIDENT: How long will you be?

MAJOR WINWOOD: I could not promise to finish in under an hour.

THE PRESIDENT: Is there any convenient point at which you could break off?

MAJOR WINWOOD: I think I would be in difficulty there.

THE PRESIDENT: It is now three-quarters of an hour before the Court usually closes, and this must not be taken as a precedent. You realise there has been a good bit said this afternoon which the Court want to contain in their minds and, if I may put it colloquially, chew over and, in view of that, the Court will now adjourn.

(At 1640 hours the Court is adjourned
until 0930 hours to-morrow 8th November,
1945.)

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